(24,744)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 477.

BRUCE SHANKS, PLAINTIFF IN ERROR,

vs.

THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JULY 16, 1915.

1

Supreme Court,

APPELLATE DIVISION—SECOND DEPARTMENT.

BRUCE SHANKS,
Plaintiff-Respondent,

against

THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY,
Defendant-Appellant.

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Statement Under Rule 41.

This action was begun by the service of a summons and complaint on defendant, on April 25, 1913. The answer of defendant was served on May 15, 1913.

Plaintiff's name is "Bruce Shanks." Defendant's name is "The Delaware, Lackawanna and Western Railroad Company." 3

There has been no change of parties or attorneys since the action was begun. Joseph A. Shay, Esq., of 50 Broad Street, Borough of Manhattan, New York City, is plaintiff's attorney.

F. W. Thomson and W. S. Jenney are the attorneys for the defendant.

This action was brought to trial before Hon. William J. Kelly, and a jury, at Trial Term, Part V, of the Supreme Court, held in and for the County of Kings, at the County Court House, in

4 the Borough of Brooklyn, New York City, on January 7, 1914; on January 8, 1914, the jury rendered a special verdict and on February 13, 1914, plaintiff's motion for a general verdict of $40,000 in his favor, and against the defendant, upon the special verdict, was granted, and thereupon a judgment for forty thousand one hundred nineteen dollars and ninety-five cents ($40,119.95), damages and costs, was entered against the defendant on February 14, 1914, in Kings County Clerk's office.

A motion for a new trial having been made by the defendant upon the minutes of the Presiding
5 Justice, which said motion was duly entertained and denied, an order denying said motion was entered in the Kings County Clerk's office on February 13, 1914.

An order of the said Trial Court, denying defendant's motion to dismiss the complaint, and granting plaintiff's motion for a general verdict, which said motions were made upon the coming in of the special verdict, was entered in Kings County Clerk's office on February 13, 1914. From said judgment and orders the defendant appealed to the Appellate Division of the Supreme Court, Second Department, and filed and served its no-
6 tice of appeal on March 5, 1914.

Notice of Appeal of Appellate Division. 7

SUPREME COURT,

KINGS COUNTY.

BRUCE SHANKS,
Plaintiff,

against

THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY,
Defendant. 8

Sir:

You will please take notice, that the above named defendant, The Delaware, Lackawanna and Western Railroad Company, hereby appeals to the Appellate Division of the Supreme Court, Second Department, from a judgment heretofore and on the fourteenth day of February, 1914, entered in the office of the Clerk of Kings County, in favor of the above named plaintiff and against the above named defendant, The Delaware, Lackawanna and Western Railroad Company, for the 9
sum of forty thousand dollars ($40,000) damages, and one hundred nineteen dollars and ninety-five cents ($119.95) costs and disbursements, amounting in the aggregate to the sum of forty thousand one hundred nineteen dollars and ninety-five cents ($40,119.95), and the said defendant intends to bring up for review on said appeal, said judgment and each and every part thereof.

Also, please take notice, that the said defendant hereby appeals to the Appellate Division of the

Supreme Court, Second Department, from the order made herein at the Trial Term of the Supreme Court, held in and for the County of Kings, at the County Court House in the City of New York, Borough of Brooklyn, on the thirteenth day of February, 1914, and entered in the Clerk's office of said County on the thirteenth day of February, 1914, which said order denied said defendant's motion for a dismissal of plaintiff's complaint, and which said order granted plaintiff's motion for a general verdict in his favor, and from each and every part of said order.

Also, please take notice, that the said defendant hereby appeals to the Appellate Division of the Supreme Court, Second Department, from the order made herein at the Trial Term of the Supreme Court, held on the 13th day of February, 1914, in and for the County of Kings, and entered in the Clerk's office of said county on February 13, 1914, denying said defendant's motion upon the minutes for a new trial and from each and every part of said order.

Dated, New York City, March 3, 1914.

Yours, etc.,

F. W. THOMSON,

W. S. JENNEY,

Attorneys for Defendant-Appellant,

90 West Street,

Borough of Manhattan,

New York City.

To

Charles S. Devoy, Esq.,

Clerk of the County of Kings.

And

Joseph A. Shay, Esq.,

Attorney for Plaintiff-Respondent.

Summons. 13

NEW YORK SUPREME COURT,

KINGS COUNTY.

Trial Desired in Kings County.

BRUCE SHANKS,
Plaintiff,

against

DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY,
Defendant. 14

To the above-named Defendant:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer on the plaintiff's attorney within twenty (20) days after the service of this summons, exclusive of the day of service; and in case of your failure to appear, or answer, judgment will be taken against you by default for the relief demanded in the complaint. 15

Dated, New York, April 24th, 1913.

JOSEPH A. SHAY,
Plaintiff's Attorney,
Office and Post Office Address,
25 Broad Street,
Borough of Manhattan,
New York City.

16 **Complaint.**

SUPREME COURT,

KINGS COUNTY.

BRUCE SHANKS,
Plaintiff,

against

DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY,
Defendant.

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The plaintiff complains of the defendant and alleges:

First. That at all the times hereinafter mentioned, the defendant was and still is a foreign corporation, duly organized and existing under and by virtue of the laws of the State of Pennsylvania, and is engaged in interstate commerce, operating through and between the States of New Jersey, Pennsylvania and New York, and in connection with its said business, owns, maintains and operates repair shops for the repairing of locomotives
18 engaged in such commerce, at Kingsland, New Jersey.

Second. That at all the times hereinafter mentioned, plaintiff was in the employ of the defendant, and at the time of the injuries herein complained of, was engaged in aiding interstate commerce, and was lawfully in the shops of said defendant at said Kingsland, New Jersey.

Third. That on January 14th, 1912, the defendant, its agents, servants and employees, and the

person in its employ, entrusted with and exercising superintendence, so negligently and carelessly conducted themselves toward this plaintiff while he was engaged in his work, that it caused and permitted the overhead traveling crane, operating upon a track in said shops to run into and collide with the body of plaintiff, by reason of which he sustained, serious, painful and permanent injuries to his body, especially to his right and left arms, both of which were amputated, and his head was seriously injured and he received other serious, painful and permanent injuries and suffered a severe shock to his nervous system and has been rendered a cripple for life, and has lost and will lose his wages at his usual avocation of machinist, all to his damage in the sum of one hundred thousand dollars ($100,000).

Fourth. That said injuries were received without any negligence on his part in anywise contributing thereto, but solely by reason of the negligence and carelessness of the defendant, its agents, servants and employees, and its said superintendent and foreman, in negligently and carelessly operating said crane without giving any notice or warning to plaintiff, and in failing to furnish him with a reasonably safe place to work, and in failing to formulate and promulgate proper rules and regulations for the operation of said crane, by reason of all of which, while plaintiff was engaged in applying a shafting to a girder upon which said electric crane traveled, the same was caused to run into and collide with him, without any notice or warning of its approach, causing the injuries above set forth.

22 Wherefore, plaintiff demands judgment against the defendant for the sum of $100,000 together with the costs and disbursements of this action.

JOSEPH A. SHAY,
Attorney for Plaintiff,
25 Broad Street,
Borough of Manhattan,
New York City.

State of New York, }
County of New York, } ss.:
City of New York, }

23 Bruce Shanks being duly sworn, deposes and says: That he is the plaintiff in the within entitled action, that he has heard read the foregoing complaint and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters therein stated to be alleged on information and belief; and that as to those matters he believes it to be true.

BRUCE SHANKS.

Sworn to before me this 23rd }
day of April, 1913. }

Stanislaw V. Crusio,
Commissioner of Deeds,
24 N. Y. City.

Answer.

SUPREME COURT,

KINGS COUNTY.

BRUCE SHANKS,
Plaintiff,

against

THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY,
Defendant.

I.

The defendant answers the complaint of the plaintiff herein, as follows, viz.:

It admits that at all the times mentioned in said complaint the defendant was and still is a foreign corporation, duly organized and existing under and by virtue of the laws of the State of Pennsylvania, and it admits that it is engaged in interstate commerce, operating through and between the States of New Jersey, Pennsylvania and New York.

It admits that at the times mentioned in said complaint plaintiff was in the employ of the defendant and was lawfully in the shops of said defendant at Kingsland, New Jersey.

It denies the allegation contained in subdivision or paragraph marked "First" in said complaint, and which is as follows, viz.:

> "And in connection with its said business, owns, maintains and operates repair shops for the repairing of locomotives engaged in such commerce, at Kingsland, New Jersey."

28 It denies the allegation contained in subdivision or paragraph marked "Second" in said complaint and which is as follows:

> "And at the time of the injuries herein complained of, was engaged in aiding interstate commerce."

Upon information and belief it denies the allegations contained in subdivisions or paragraphs marked "Third" and "Fourth" in said complaint.

II.

29 For a second and separate and complete defense to the plaintiff's alleged causes of action in said complaint the defendant alleges and shows to the Court, upon information and belief, that whatever injuries were received by the plaintiff as set forth in said complaint were caused wholly by plaintiff's own carelessness and negligence.

III.

For a third and separate and complete defense to the plaintiff's alleged causes of action in said complaint, the defendant alleges upon information and belief:

30 That if any negligence other than that of the plaintiff's, caused or contributed to cause plaintiff's alleged injuries, such negligence was that of a competent fellow servant or servants of the plaintiff for which the defendant is not liable.

IV.

For a fourth and separate and complete defense to the plaintiff's alleged causes of action in said complaint, the defendant alleges upon information and belief:

That whatever injuries plaintiff received while 31
in defendant's employ were sustained while plaintiff was in the employment of the defendant as a mechanic in its shop, and said employment had no direct or indirect connection with interstate commerce.

That said employment had certain risks incident thereto which were obvious and well known to plaintiff at all times of said employment and also when plaintiff first entered upon said employment, and that said risks were assumed by the plaintiff and whatever injuries plaintiff received in said employment and which are complained of by him arose from said risks all of which were 32
taken and assumed by the plaintiff at the time he entered upon said employment and during the continuance thereof.

V.

For a fifth and separate and complete defense to the plaintiff's alleged cause of action in said complaint, the defendant alleges as follows, viz.:

That at the time plaintiff was injured, the plaintiff was working as an employee of the defendant, and the injuries which he received were received in the course of such employment in the 33
State of New Jersey, and said employment was wholly within the State of New Jersey, by virtue of a contract made between the plaintiff and the defendant subsequent to July 4th, 1911.

That Section II of Chapter 95 of the Laws of the State of New Jersey of the year 1911, and the provisions thereof, were accepted by the plaintiff in his said contract of employment; and the said provisions are binding upon the plaintiff in this action, together with the remaining provisions of said Chapter 95 and with the provisions

34 of Chapter 368 of the Laws of the State of New Jersey of the year 1911, which is entitled as a supplement to said law contained in said Chapter 95. That said Chapter 95 became a law of the State of New Jersey on April 4th, 1911, and said Chapter 368 became a law of the State of New Jersey on May 2nd, 1911.

That by reason of the said statutes and the premises herein the plaintiff is barred and precluded from maintaining this action. That the said statutes are known as the Compensation Law of New Jersey, and are here pleaded as a complete defense to this action.

35 Wherefore, defendant demands judgment that the complaint be dismissed with costs.

F. W. THOMSON,
W. S. JENNEY,
Attorneys for Defendant,
Office and Post Office Address,
No. 90 West Street,
New York City.

State of New York, }
County of New York, } ss.:
City of New York, }

A. D. Chambers, being duly sworn, deposes and says: That he is an officer, to wit, the Secretary of
36 The Delaware, Lackawanna and Western Railroad Company, the defendant herein; that he has read the foregoing answer and knows the contents thereof and that the same is true of his own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

A. D. CHAMBERS.

Sworn to before me this 16th day of May, 1913.

Joseph Fiell,
Notary Public,
New York County.

[SEAL.]

Clerk's Minutes. 37

At a Trial Term of the Supreme Court of the State of New York, held in and for Kings County, at the Court House in the Borough of Brooklyn, on the 7th day of January, 1914.

Present—Hon. WILLIAM J. KELLY, Justice.

BRUCE SHANKS

against

THE DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY.

No. 3827. 38

This cause having been called for trial in its order on the Calendar, and twelve trial jurors having been duly drawn, empanelled and sworn to try the same, the jury comes into Court and answers the questions submitted to them as follows:

1. Were the plaintiff's injuries the result of negligence of the defendant, or of any of the officers, agents or employes of said defendant or by reason of any defect or insufficiency in its appliances, machinery, works or equipment? 39

Answer: Yes.

If the jury answer the above question in the negative, they need proceed no further. If the jury answer the foregoing question in the affirmative, they will then answer the following questions:

40 2. Was the plaintiff himself free from contributory negligence? Did he act as a reasonably prudent man would have acted?

Answer: Yes.

3. What sum is reasonable compensation for the damages sustained by plaintiff?

If the jury find that the plaintiff himself was guilty of negligence contributory to the injury, the damages must be diminished by the jury in proportion to the amount of negligence attributed to plaintiff.

Answer: Forty thousand dollars ($40,000).

41 On the finding of the jury the plaintiff's counsel moves that the Court direct a general verdict for the plaintiff for the sum of forty thousand dollars ($40,000).

Defendant's counsel renews his motion to dismiss plaintiff's complaint. Decision reserved.

February 9th, 1914, by Kelly, J.

Defendant's motion to dismiss the complaint denied: Plaintiff's motion for directing a general verdict in his favor granted. See memo. filed.

February 13th, 1914. Order signed denying motion to set aside verdict and for a new trial.

Further ordered that the plaintiff's motion for a
42 general verdict for the sum of $40,000 be granted and that plaintiff have judgment therefor.

An extract from the minutes.

CHARLES S. DEVOY,
Clerk.

Order Denying Defendant's Motion for a Dismissal of Complaint, and Granting Plaintiff's Motion for a General Verdict Upon Coming in of Special Verdict. 43

At a Trial Term of the Supreme Court, held in and for the County of Kings, at the County Court House in the City of New York, Borough of Brooklyn, on the 13th day of February, 1914.

Present—Hon. WILLIAM J. KELLY, Justice.

BRUCE SHANKS,
Plaintiff, 44

against

THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY,
Defendant.

The issues in the above-entitled action having come on for trial at a Trial Term, Part V of this Court and having submitted the following questions to the jury for a special finding, to wit: 45

1. "Were the plaintiff's injuries the result of negligence of the defendant, or of any of the officers, agents or employees of said defendant, or by reason of any defect or insufficiency in its appliances, machinery, works or equipment?"

If the jury answer the above question in the negative, they need proceed no further. If the jury answers the foregoing question in the affirmative, they will then answer the following questions.

2. "Was the plaintiff himself free from contributory negligence? Did he act as a reasonably prudent man would have acted?"

3. "What sum is reasonable compensation for the damages sustained by the plaintiff?

If the jury find the plaintiff himself was guilty of negligence contributing to the injury, the damages must be diminished by the jury in proportion to the amount of negligence attributed to plaintiff.

And the jury having answered the first two questions in the affirmative and having assessed the plaintiff's damages at the sum of forty thousand dollars, and upon the coming in of said special verdict, the defendant having renewed its motion for a dismissal of the complaint and the plaintiff moving for a general verdict in his favor for the sum of forty thousand dollars, and after hearing Joseph A. Shay, Esq., counsel for plaintiff, and Frederick W. Thomson, Esq., of counsel for defendant, upon said motions, and after due deliberation having been had, it is,

Ordered, that the motion made by the defendant be and the same hereby is in all things denied, and it is further

Ordered, that the plaintiff's motion for a general verdict for the sum of forty thousand dollars ($40,000) be granted and that plaintiff have judgment therefor.

Enter,

WILLIAM J. KELLY,
J.

Granted, Feb. 13th, 1914.

CHARLES S. DEVOY,
Clerk.

Judgment.

49

SUPREME COURT,

KINGS COUNTY.

BRUCE SHANKS,
Plaintiff,

against

THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY,
Defendant.

50

The issues in this action having been duly tried before the Court and a jury having rendered a special verdict in favor of the plaintiff and against the defendant for the sum of forty thousand ($40,000) dollars, and the Court having granted a motion of the plaintiff's attorney for a general verdict for the said sum and the plaintiff's costs and disbursements having been taxed for the sum of $119.95

Now, on motion of Joseph A. Shay, Esq., attorney for plaintiff, it is

51

Ordered and adjudged that the plaintiff Bruce Shanks do recover from the defendant, the Delaware, Lackawanna and Western Railroad Company the sum of forty thousand ($40,000) dollars damages and $119.95 costs amounting in the aggregate to the sum of $40,119.95 and that he have execution therefor.

Dated, New York, February 14, 1914.

CHARLES S. DEVOY,
Clerk.

52 **Order Denying Motion for a New Trial**

At a Trial Term of the Supreme Court, held in and for the County of Kings at the County Court House in the City of New York, Borough of Brooklyn, on the thirteenth day of February, 1914.

Present—Hon. WILLIAM J. KELLY, Justice.

BRUCE SHANKS,
Plaintiff,

53 *against*

THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY,
Defendant.

This action having been brought on for trial at a Trial Term, Part V, of this Court, before Honorable William J. Kelly, Justice, and a jury, and the plaintiff appearing by Joseph A. Shay, Esq., his attorney, and the defendant appearing by F. 54 W. Thomson, its attorney, and the issues having been tried, and the Court having submitted the following questions to the jury for a special finding, to wit:

"1. Were the plaintiff's injuries the result of negligence of the defendant, or any of the officers, agents or employes of said defendant, or by reason of any defect or insufficiency in its appliances, machinery, works or equipment?

"2. Was the plaintiff himself free from 55
contributory negligence? Did he act as
a reasonably prudent man would have
acted?

"3. What sum is reasonable compensation for the damages sustained by the plaintiff?"

And the jury having answered the first two questions in the affirmative and having assessed the plaintiff's damages at the sum of forty thousand dollars, and upon the coming in of said special verdict, the defendant having renewed its motion for a dismissal of the complaint and the plaintiff 56
having moved for a general verdict in his favor for the sum of forty thousand dollars, and the Court having denied the said motion of the defendant and having granted the plaintiff's said motion and the Justice presiding at the trial having thereupon entertained a motion made by the defendant upon the minutes to set aside the verdict and for a new trial, upon all the grounds specified in Section 999 of the Code of Civil Procedure, and upon the exceptions taken and had by said defendant upon the trial;

Now, after hearing F. W. Thomson, attorney for the defendant for said motion, and Joseph A. Shay, Esq., attorney for the plaintiff against said 57
motion, it is

Ordered, that said motion be, and the same hereby is in all respects denied.

Enter,

WILLIAM J. KELLY,
Justice of the Supreme Court
of the State of New York.

Granted Feb. 13, 1914,

CHARLES S. DEVOY,
Clerk.

58 **Case and Exceptions.**

SUPREME COURT,

KINGS COUNTY.

Trial Term—Part V.

Tried before Hon. William J. Kelly, and a Jury,

BRUCE SHANKS,
Plaintiff,

v.

59 DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY,
Defendant.

Brooklyn, N. Y., January 8th, 1914.

APPEARANCES:

JOSEPH A. SHAY, Esq., Attorney for Plaintiff.

FREDERICK W. THOMSON, Esq., Attorney for Defendant.

The Court: You say this action is brought
60 under the Federal Act. Reading the complaint it looks to me like an ordinary common law action for negligence.

By Mr. Shay: The first allegation charges Interstate Commerce, that the Railroad is engaged—

The Court: There is no reference made to the Federal statute.

By Mr. Shay: No, sir, we never do in these cases.

The Court: The complaint is sufficient without reference to the Act?

Mr. Shay: Yes, sir. 61

Mr. Thomson: The defendant does not question the sufficiency of the pleadings.

The Court: To bring the case under the Federal statute?

Mr. Thomson: No.

The Court: In this case, the fact that the pleading presents a case under the Federal Interstate Commerce Act, that question is not raised?

Mr. Thomson: No, we do not, we waive any defect in the complaint.

The Court: You say he is covered by the Compensation Act?

Mr. Thomson: Yes, sir. 62

The Court: And if he is covered by the Compensation Act, by the terms of that Act he must look to that Compensation Act?

Mr. Thomson: Yes, he is bound by it.

The Court: He cannot sue under the Common Law?

Mr. Thomson: No.

BRUCE SHANKS, being duly sworn, testified, as follows:

Direct examination by Mr. Shay:

Q. Where do you live? A. 195 Hendrick Street, Brooklyn. 63

Q. Where are you now stopping? A. St. Mary's Hospital, Hoboken, New Jersey.

Q. Is that the hospital to which you were taken when you were injured? A. Yes, sir.

Q. You were in the employ of this company, were you not? A. Yes, sir.

Q. When did you go into the employ of the company? A. On March 2nd, 1910.

Q. Where did you work for the defendant? A. In Kingsland, New Jersey.

64 The Court: Where is that?

Q. Where is Kingsland, New Jersey? A. About nine miles from Hoboken.

Q. Were you at work in the shops there? A. Yes, sir.

Q. What shops were they? A. The machine shops for repairing locomotives.

Q. What locomotives did they repair? A. Locomotives for going out of the State and in the State.

Q. Were they passenger and freight locomotives? A. Passenger and freight both, yes, sir.

Q. Are the engines distinguished by number? A. Yes, sir.

65 Q. The engines used for local work what numbers would they be? A. Up to about 900.

Q. And above 900? A. The 1000 class are used for going out of the State.

Q. Is there any other distinction between the two classes of locomotives, one larger or one smaller? A. No.

Q. But the 1000 class, they call— A. They were the ones for going out of the State, going to Scranton.

Q. What was your principal work in the shops there? A. The work I was engaged in was rush work. These engines would be pulled into Hoboken,

66 and if anything would be wrong they would send the parts to Hoboken, and I would have to get those parts—they would be pulled into the roundhouse and the parts would be sent up to Kingsland to be repaired right away and sent back.

Q. And that was what was called rush work, was it? A. Yes, rush work.

Q. Was the rush work on the local locomotives or the locomotives used in going out of the State? A. The rush would be generally on the ones going

out of the State, the others they have got extra engines there to pull them out. 67

Q. Were you the only man— A. I was the only man on this bench for this class of work.

Q. What repairs would you make to the locomotives? A. If there was broken valves or broken valve yokes or what we call binders, parts like that, we would have to get those parts forge-drilled, and all the work done on them, and send them right back to Hoboken, Secaucus and Port Morris, all the different roundhouses.

Q. Was that your special work? A. Yes, sir.

Q. For how long were you engaged in that work? A. For one year and ten months.

Q. All the time you were with the company? A. Yes, sir. 68

Q. At any time were you ever called off that work? A. Yes, sir, if there was no work coming from these places I would have to do what was called millwright work, keep the machines in repair, but if anything came from these places I would have to drop this and go on the other by orders of the foreman.

Q. Who was your foreman? A. Mr. Bohler. And under him was Mr. Nelson.

Q. And they directed you in your work? A. They directed me. If it was millwright work Mr. Nelson directed me what to do, the other work Mr. Bohler. 69

Q. On the day that you were hurt what were you doing, Mr. Shanks? A. I was told to go upon this scaffolding and take down that counter-shaft with the pulleys, which was fastened on the bottom of the girder.

Q. In those shops did they have an electric crane? A. Yes, sir.

Q. Describe an electric crane? A. An electric crane is for transporting the parts from one part

70 of the shop to the other, different parts of the locomotives.

Q. How was it constructed in the shops? A. It ran on four pulleys or wheels.

Q. The crane? A. The crane ran on a rail the same as a trolley.

Q. The rails, where did they run in the shop? A. They are fastened along the top of this girder.

Q. By this girder what do you mean? A. The girders are those iron rails which sit on the supports there on those columns.

Q. The electric crane that was how high from the floor of the shop? A. From twenty to thirty feet.

71 Q. You say that the girders ran the length of the shop on the sides? A. One girder ran the whole length of the shop against the wall, and the other was fastened on the columns in the center of the shop.

Q. And the columns were twenty or thirty feet high? A. About that, yes, sir.

Q. Then the traveling crane, you say, traveled upon those girders? A. On the rails fastened to those girders.

Q. Twenty or thirty feet from the floor of the shop? A. Yes, sir.

Q. What was the object of the traveling crane? A. To carry the parts of the locomotives from one

72 end of the shop to the other.

Q. Describe how it works? A. A man sat in the center of this crane in a box.

Q. Where did he sit in the center of the crane? A. That would be in the center, would be from the middle of the shop, I would say; the middle from one part of the shop to the other. He would sit there, and he would be called, then he would lower his fall, pick up what was required and transport it to the other part of the shop.

Q. The part that he sat on, how was that fastened to the crane? A. That is attached to the crane, yes, sir. 73

Q. Underneath the trusswork? A. Yes, sir, underneath the trestle work.

Q. The wheels, you say, ran the full length of the shop; the width of the shop rather? A. Yes, sir.

Q. How would he operate the crane? A. When he would be called he threw the switch on, the power.

Q. It was that electric crane? A. Yes, sir.

Q. How would it move? A. It would move down the shop just the same as a trolley. 74

Q. And you say it would pick up? A. He would move another lever for lowering or raising.

Q. Was it in the nature of a block and fall? A. Yes, sir.

Q. Was the electric crane to which you have referred in the shops at the time you went there? A. Yes, sir.

Q. And there all the time? A. Yes, sir.

Q. At the time of your injury what were you doing? A. I was instructed to go up on that scaffolding and take down that counter-shaft.

Q. Instructed to go on a scaffold and take down the counter-shaft? A. Yes, sir, and attach it to another part of the girder. 75

Q. Where was the shafting? A. It was at that time fastened to the girder.

Q. To this overhead girder? A. To the bottom of the overhead girder.

Q. Upon which the crane traveled? A. Yes, sir.

Q. How was it fastened? A. Fastened with two hangers, and each of these hangers are fastened with four bolts to the bottom of the girder, and that carried the shaft with the pulleys.

76 Q. Describe these hangers? A. These hangers are made of cast iron bushed with brass, to carry the shaft.

Q. Would they be fastened through the girder? A. The head of the bolt on the outside and the nut on the bottom side.

Q. They would be fastened— A. Up against the bottom of the girder.

Q. Then this shaft was run through? A. That shaft is stationary, that drives the machine below.

Q. Is that what you were doing at the time you were hurt? A. I took down that countershaft and was putting it in another part of the girder.

77 The Court: What was this countershaft used for?

The Witness: To drive a shaping machine. This machine is used for shaping keys and cotters and brasses for connecting rods.

The Court: What are cotters?

The Witness: You put in a key and a cotter to keep its place.

Q. It is a cotter pin? A. Yes, sir.

The Court: Keys and cotters are used where?

78 The Witness: These keys are used to hold the piston rods on locomotives.

The Court: Were these keys and cotters articles that you used in the rush work?

The Witness: Yes, sir, they would be used in the rush work, too.

Q. Did they have any other machine such as that in the yard? A. No, there was just two of these shaping machines in that shop for this work.

Q. You say the keys and the cotter pins that

were shaped in that machine were used in your work? A. They were used to keep the piston rod in the cross head. 79

Q. In locomotives? A. Yes, sir.

Q. And you were just going to move that machine, were you? A. No, I had taken down the countershaft, left it on the floor, and measured out where it was to go in to suit the drive. Then got up, laid the holes for one hanger off, fastened same to place. Found when I came to apply the second hanger that the holes would come in between the two girders, which was a space of half an inch, therefore the hanger could not be applied. I then stepped on the rail of the girder, 80
on the edge of the girder, to see if you could fix it from the other side, but before doing that I looked along the rail and saw the crane was stationary. I then turned around to my helper and asked him to hand me up the lath on which I had the distance marked where the hanger was to be applied. In the meantime the crane came along right down on top of me, without any signal whatever. The force of the crane drove me off the girder, I felt myself falling, and I threw out my left hand and caught the rail with it. The crane then stopped. One hand had been cut clean off, and the wheel of the crane stopped on the other hand. I was suspended by this hand until brought 81
down by a helper.

Q. How long were you working there before that happened? A. From half-past seven that morning until about ten o'clock or perhaps half-past ten.

Q. During that time had this crane gone past you? A. Yes, sir, several times up and down.

Q. Was there any system of any kind, any signal system in connection with this crane? A. The only thing if you wanted the crane, you were work-

82 ing on the crane, you would shout to the man around, or whistle to him.

Q. What would he do? A. If there were anybody they would clear out. There was no electric signal whatever.

Q. Before he started would he give any warning or shout? A. He might say "Keep clear there."

Q. Had he passed you at all during that morning? A. Several times that morning.

Q. At the time that you were standing upon the flange of the girder, as you have described, you say he was at a standstill? A. The crane was standing
83 still.

Q. Did you see the man in the box? A. Yes, sir, I saw him quite plain in the box.

Q. Did you look at all? A. I did before I got up, because I had been working there before, and I often told him to watch us, to keep clear.

Q. While you were standing up there did you look at all? A. Yes, sir, I certainly did.

Q. How long were you standing there before you were struck? A. I might have been there perhaps a minute.

Q. When you got up there you say he was standing still? A. The crane was stationary.

84 Q. Before he struck you did he shout? A. I heard no signal whatever.

Q. Did you hear anybody call the crane? A. No, I heard no one call the crane.

Q There was no bell nor whistle? A. No, sir.

Q. Nothing like that? A. No, sir.

Q. And the only system was to whistle, someone would whistle? A. Yes, sir, or call him.

Q. From the scaffold to the girder what was the distance? A. When I was standing on that scaffolding my head and shoulders were above the top

of the rail. 85

Q. Then the top of the scaffold would be underneath the girder, would it? A. Yes, sir, it would be more than a foot distance there.

Q. About a foot underneath? A. It would be more.

Q. From the top of the scaffold to the bottom of the girder, a foot or more? A. It would be more, perhaps fourteen or fifteen inches.

Q. And you say when you stood up there your head and shoulders would be above the girder? A. Yes, sir.

Q. In that position could the man operating the crane see you? A. Yes, sir, he could see me dis- 86
tinctly.

Q. Could you see him? A. Yes, sir, he was sitting in his box.

Q. What distance was he away from you? A. I couldn't give the distance.

Q. From the center of the crane to the top of the girder, to the side of the girder, what distance do you suppose it would be? A. I wouldn't swear what distance that was.

Q. But he could see you, could he? A. Yes, he could see me.

Q. This cross piece that we have on this model, was the cross piece as large as the one here? A. 87
Yes, sir, that seems to be made in proportion.

Q. Would the man operating the crane stand or sit? A. Sometimes sitting and sometimes standing, according to the work. If they were busy.

Q. At the time that you were hurt did you have your right arm over the girder? A. I had my hand on the rail and looking over like that to see how it fastened on the other side. Then I turned around this way and told my helper "If you hand

88 me up the lath I will measure the distance. In that time the crane came right down on me.

Q. And it was at that time that you were struck? A. Yes, sir.

Q. At the time you were struck did you shout? A. Yes, when the crane was right on me, the pain, I gave out a yell, and the crane stopped over this left hand, the right hand had been cut clean off.

Q. Where were you taken after that? A. I was taken to the private office and they sent for a doctor. He came in about an hour after I was injured, and then bathed the wounds with hot water to take out all the oil and dirt, and from there I
89 was brought to St. Mary's Hospital, Hoboken.

Q. Did you suffer any pain at that time when he poured the hot water on the wounds? A. Yes, sir, intense pain.

Q. Then you were taken to St. Mary's Hospital? A. Yes, sir.

Q. What was done there to you? A. This stump that was all sewn up.

Q. Which one? A. The right hand; and the fingers on the other were cut off, and the other hand also dressed up.

Q. They cut that off? A. Yes, sir, they couldn't save it.

90 Q. Was there any other operation performed on your arm at all? A. That is all, one operation.

The Court: The right hand is cut off at the wrist?

The Witness: Yes, sir.

The Court: And the left where?

The Witness: About two and a half inches higher up.

Q. It is just below the elbow? A. Yes, sir.

The Court: Have you the wrist joint of 91
the right hand?

The Witness: No, sir, that is cut right off.

Q. That has been taken off? A. Yes, sir.

Q. How about the left? A. That is two-and-a-half inches higher up.

Q. How long were they treating you at the hospital? A. That was on the fourteenth of January the accident happened. February, March, April, up to May they were treating me.

Q. And in that time you suffered pain? A. I suffered excruciating pain.

Q. Do you suffer any pain now? A. Yes, sir, 92
when the weather changes, if damp weather comes you feel like needles going in you.

Q. What sort of pain is it? Do you feel as if it was in your hands? A. Yes, sir, you feel as if you had your fingers.

Q. Are you able to help yourself at all? A. I cannot. I got a man in the hospital to dress me and give me a bath, cut up meat for me.

Q. You have been stopping at the hospital ever since? A. Yes, sir.

Q. Tell us what the man does for you? A. In the morning I get up he washes me and dresses me. Then at breakfast he cuts up my meat. I 93
have got a strap, I can use the fork, that is all I can do.

Q. They cut up the food for you? A. Yes, sir. If I am out on the streets I have to get the carman or conductor to take out my fare. If I am obliged to go to the toilet I have got to ask a man to assist me.

Q. How much were you earning at the time you were hurt? A. I was earning about $17 a week, counting overtime.

94 Q. What have you earned since? A. I have earned nothing since.

Q. Before going to work for this railroad company what were you employed at? A. I was representing a firm at Belfast, Ireland, in Germany, France and Italy, for the manufacture of flax spinning machinery, machinery for spinning flax, hemp and jute.

The Court: You were acting as an agent?

The Witness: Yes, sir.

Q. You traveled over the Continent for them?
95 A. Yes, sir, fifteen years.

Q. What were you earning at that time? A. Formerly, when I was erecting machinery for them, I made about $25 a week. Afterwards, when I received the agency I received about four hundred pounds a year, about $2,000 a year.

Q. How old were you at that time? A. Twenty-seven.

Q. How old are you now? A. Forty-two.

Q. Did you come to this country with the intention of going into this line of work? A. No, sir, I came to this country with the intention of starting an agency.

Q. Did you suffer any other injuries besides the
96 loss of your hands? A. That is all I have suffered, the loss of my hands.

Q. Your head wasn't injured? A. No, sir, my head wasn't injured.

The Court: How long had you been working on the countershaft at the time of the accident? Had you been working from half-past seven until ten o'clock?

The Witness: Yes, sir, we had taken down—

The Court: On the day before, what had you been doing? 97

The Witness: I was working on another machine.

The Court: Millwright work?

The Witness: Yes, sir, on millwright work that day.

The Court: Altogether?

The Witness: I couldn't say the day before. If anything came in that day I would have been taken off.

The Court: You don't know whether you did any rush work the day before or not?

The Witness: No, sir, I can't say. 98

The Court: How long before the happening of the accident do you say now that you had been engaged on work on parts of locomotives? How long before then? You say you do not know about the day before?

The Witness: Yes, sir, the day before. Off and on that week. I was taken from what I was at and put at that work that came from the round house.

The Court: You were the only man that did that kind of work?

The Witness: Yes, sir. And all the work was brought to this bench, all the rush work from the round house, and I did that right away. 99

The Court: You did that work with the foreman, you say?

The Witness: Yes, sir.

The Court: This man Nelson?

The Witness: No, sir, Bohler did the rush work, and Nelson the millwright work.

The Court: You did the rush work with Bohler?

The Witness: Yes, sir, he was the foreman.

100 The Court: Was there some particular part of the shop where you did that work, or was it done all over the shop?

The Witness: No, that was done at one bench.

The Court: Where was the bench at which you did this work?

The Witness: Right beside Mr. Bohler's desk.

The Court: Where was it with reference to the place where you met with the accident?

The Witness: It was just right beside where I met with the accident, right in the
101 center of the shop.

The Court: This countershaft the location of which you were changing, was operated from the belting—

The Witness: By a belt from the main shaft.

The Court: Did it operate the machines that you used in doing the rush work?

The Witness: Yes, sir.

The Court: The place where you did your part of this rush work was in the vicinity of this countershaft, underneath it, on the floor?

The Witness: On the floor, yes, sir.

102 The Court: And you worked there with a man named Bohler, who was your foreman?

The Witness: Yes, sir.

The Court: Who told you to change the location of the countershaft?

The Witness: Nelson, he looked after the millwright work in the shop, he was under Bohler.

The Court: Did you use this countershaft for millwright work too?

The Witness: It drove the shaping ma- 103
chines.

The Court: The rush work that you did on the locomotives, was that millwright work?

The Witness: No, that wasn't millwright work; millwright work is only repairing machinery.

The Court: Repairing machinery in this plant?

The Witness: Yes, sir.

The Court: Bohler was the foreman for the rush work, and Nelson for the millwright work?

The Witness: Yes, sir. 104

The Court: Who was the foreman over the man in the crane?

The Witness: That would be Mr. Bohler, he would be his foreman.

The Court: Over the man that operated the crane?

The Witness: Yes, sir, Mr. Bohler was the machine foreman.

The Court: What does that mean?

The Witness: He would look after all the machines, got the stuff ready for the locomotives.

The Court: Did locomotives themselves 105
ever come in the shop?

The Witness: Yes, sir, there were always plenty of locomotives in the shop at one time for repairs.

The Court: Locomotives from all over the State?

The Witness: Yes, sir.

Q. Was there another such shop as this? A. Yes, sir, in Scranton, Pennsylvania.

Q. And that was the only one in the State of

106 New Jersey, was it? A. Yes, sir, Kingsland is the only one in New Jersey.

Q. That would be the only place where these engines could be repaired? A. Yes, sir, that was the only place.

Q. Where was Bohler on Saturday, was he there? A. He was in the shop on Saturday.

The Court: What day of the week did this accident happen?

The Witness: On the 14th.

The Court: What day of the week?

The Witness: Sunday morning.

107 Q. When were you asked to do this work on Sunday? A. On Sunday morning.

Q. Yes. A. I was told to go right away when I came in from breakfast.

Q. Did you usually take your orders— A. The millwright work I took from Nelson and the work for the locomotives from Mr. Bohler, as he was my foreman.

The Court: Where did you live at the time this accident happened?

The Witness: I lived in East New York, but I stopped in Newark, and for week-ends I came home.

108 The Court: You stopped in Newark?

The Witness: Yes, sir.

The Court: You went in and out from Newark to Kingsland every day?

The Witness: Yes, sir, and on week ends and holidays I came to my home in Brooklyn.

Q. Who was at your home in Brooklyn?

The Court Excluded.

Cross examination by Mr. Thomson:

Q. You came to this country when? A. In October, 1909. 109

Q. Was the first job you got, after arriving in this country, with this Lackawanna Railroad? A, No, the International Pump Works.

Q. Where are they located? A. Harrison, New Jersey.

Q. How long after you had been there before you commenced with the pump works? A. I worked four months in the pump works.

Q. How long was it after you arrived in this country before you got that first job? A. I arrived Monday morning and I got the job on Friday.

Q. The next Friday? A. Yes, sir, on the following Friday. 110

Q. And you worked for the pump works how long? A. Up to the end of February, the last day in February, the 28th, then I started in with the other place on March 2nd.

Q. In a few days you started working for the railroad at Kingsland? A. Yes, sir, about three days.

Q. What was your employment in the pump works? A. In the pump works I was erecting pumps for the Panama Canal.

Q. You were assembling pumps together? A. Yes, sir.

Q. What wages did you draw from the pump works? A. I was earning $21 a week with overtime. On an average $21 per week. 111

Q. Overtime work is where you work over hours on a week day and when you work on Sundays? A. It was double time on Sundays.

Q. That is what is called overtime work? A. Yes, sir.

Q. Then you started to work for the Lackawanna Railroad in March when? A. March 2nd, 1910.

112 Q. And you worked out in the Kingsland shop all the time? A. Yes, sir, all the time.

Q. And you worked at this bench from the start, didn't you? A. All except one month.

Q. And what month was that? A. The first month I was there.

Q. What did you do then? A. I was working on pistons and piston rods, and then I was transferred to this rush bench.

Q. And you say your wages with the Lackawanna were about $17 a week? A. Yes, sir, with the overtime.

Q. What was that address in Newark where you
113 boarded during the week? A. 20 State Street, Newark.

Q. Did you board there too when you worked for the pump works? A. No, sir, I lived at Belleville, that is outside of Newark.

Q. How far is that from Newark? A. Four miles.

Q. You haven't any family, have you? A. No, I am not married.

Q. You have never been married? A. No, sir, never.

Q. This day you were hurt you were working on Sundays? A. Yes, sir.

Q. When were you told about that work on Sun-
114 day? A. On Saturday I was told to come in.

Q. Did some one tell you to come back Sunday morning and work? A. Yes, sir.

Q. That was overtime work? A. Yes, sir.

Q. And they told you that they wanted you to shift this belting on the bottom of this truss? A. Yes, sir.

Q. Did you help them construct those two platforms used on this work? A. No, sir, that was made in the carpenter's shop.

Q. Somebody else made them? A. Yes, sir. 115

Q. The shops are several hundred feet in length aren't they? A. Yes, sir.

Q. Where this traveling crane runs? A. Yes, sir.

Q. And you estimate it at three hundred to five hundred feet? A. I couldn't estimate on that, as to the length.

Q. It was a pretty big room? A. Yes, sir.

Q. And the electric crane travels the full length of the shop? A. Yes, sir.

Q. And the crane is constructed of two iron girders which rest at each end upon a cross girder? A. Yes, sir.

Q. And under this end girder are two wheels, one 116
at each end of the girder underneath? A. Yes, sir.

Q. And those two wheels rest upon tracks? A. Yes, sir.

Q. Railroad tracks? A. Yes, sir.

Q. And those railroad tracks upon which the four wheels of the crane rest, are fastened to the top of the middle of trusses which run the whole length of the shop? A. Yes, sir.

Q. And those trusses upon which the wheels of the crane travel, and upon which the railroad tracks are fastened, are supported in the air by upright steel pillars? A. Yes, sir.

Q. And those trusses are distant from the ground
on these pillars about seventeen or eighteen feet? 117
A. I couldn't say the distance. I say about twenty or thirty feet.

Q. So the electric crane travels along in the top of the shop, in the room? A. Yes, sir.

Q. And suspended from the middle of the crane, midway between the two trusses upon which the wheels travel, is what is called an engineer's box? A. Yes, sir.

Q. That hangs down from the bottom of the two cross pieces of the crane? A. Yes, sir.

118 Q. And he sits in that box to operate the crane? A. Yes, sir.

Q. And the crane was operated by electricity? A. Yes, sir.

Q. And suspended from one of the griders of the crane, and about midway in front of the operator, was his block and fall? A. Yes, sir.

Q. Which was also operated by electricity, and with which he could pick up from the floor underneath, the driving wheels of a locomotive, and then by moving his crane he could move that weight to and fro along the full length of the shop, if he wished to? A. Yes, sir. It could also go from left
119 to right.

Q. The block and fall? A. Yes, sir.

Q. So as to cover the entire distance between the trusses? A. Yes, sir.

Q. The entire distance between the floor? A. Yes, sir.

Q. So that between these pillars which supported the trusses upon which the electric crane traveled, this block and fall, by being able to be worked from right to left, could raise and carry any weight which would happen to lie on the floor between the two rows of pillars which supported the trusses? A. Yes, sir.

Q. I mean it could handle anything within this
120 space? A. Yes, sir.

Q. When you got there Sunday morning these platforms upon which you stood to work upon the shaft that you were to move, had already been constructed, hadn't they? A. Yes, sir, they had already been constructed.

Q. And there were two platforms there or scaffolds? A. No, I only used the one.

Q. But there were two there? A. Yes, sir.

Q. And they were made the same way? A. Yes, sir.

Q. They were like two stools, with four legs on each one? A. Yes, sir. 121

Q. A sort of saw-horse construction with a platform built on top? A. Yes, sir.

Q. How many men were working with you that day, that morning? A. Just one helper.

Q. One on the platform with you? A. That was all.

Q. Weren't there some others engaged on the other platform? A. On the other platform were two boys engaged there, they were working at another counter-shaft for another machine.

Q. And you had nothing to do with them? A. No, sir.

122

Q. But one man worked on the platform with you, and he was your helper? A. Yes, sir, he was my helper.

Q. You and your helper were standing on top of one of these platforms, which has been described, which was placed directly underneath the truss? A. Yes, sir.

Q. And the mill shaft which you were changing was fastened to the bottom of that truss? A. Yes, sir.

Q. And it was your work that morning to take that away and move it about how far along on the truss? A. I think we were moving it perhaps—I can't just say now,—perhaps two feet. It was to make room on the main shaft.

123

Q. You were moving it on the bottom of the truss about two feet, and refastening it to the truss? A. No, we let it down with—the block and fall let it down on the floor.

Q. You were going to bring it up again and hitch it to the bottom of the truss only two feet away from where it had been originally? A. Yes, sir.

Q. It was your work to take it off the truss

124 and move it about two feet and put it back on the truss? A. Yes, sir.

Q. But between the time of removing it from the truss and putting it back again, you had to let it down on the floor because you had to prepare new holes to run the bolts through? A. Yes, sir.

Q. How deep was the truss? A. I couldn't say.

Q. Measuring from the point where the rail was fastened on top of it to the bottom part where you were fastening the shafting? A. I couldn't swear.

Q. Just give your best judgment? A. Perhaps eighteen inches; about eighteen inches, I would say, or two feet.

125 Q. Then there was a flange on the top and bottom of the truss? A. Yes, sir.

Q. And this part here between the two flanges, between the bottom and the top of the truss, was a comparatively thin sheet of steel? A. Yes, sir.

Q. About an inch thick? A. That would be about an inch thick, yes, sir.

Q. There were angle irons and braces between the two flanges at different distances to brace the thing and make it firm? A. Yes, sir.

Q. That is what makes these steel trusses, that is their construction, isn't it? A. Yes, sir.

Q. I understood you to say, on your direct ex-
126 amination, that the top of this platform, the distance between the top of the platform on which you stood and the bottom of the truss on which you were working, was twelve to fourteen inches? A. Yes, sir, I think it would be about that.

Q. That is your best recollection of the distance? A. Perhaps eighteen inches. Yes, sir.

Q. You went to work on Sunday morning at what hour? A. At half-past seven we started to work.

Q. And your work that morning, after you got

the shafting loosened and taken away from the truss and lowered to the floor, your next work was to bore holes? A. Was to lay off the holes. 127

Q. And bore them through the truss at the point when you were going to put back the shafting? A. Yes, sir.

Q. And you were engaged on the hole boring proposition when you were hurt? A. Yes, sir.

Q. And you had bored some holes through the truss at that time? A. We had one hanger fastened on.

Q. And you had bored some other holes? A. No, then I came to fasten the second hanger and I found that the holes would come where the two trusses came together. 128

Q. What time of the day were you hurt? A. About ten o'clock, perhaps ten or—

Q. You worked about two hours and a half? A. Yes, sir.

Q. How many times, to the best of your recollection, had this crane been moved back and forth, in the position where you were working, during that two hours and a half? A. It might have been, perhaps, ten or fifteen times up and down that morning.

Q. That is counting each movement one way one time? A. Yes, sir.

Q. The truss upon which you were working was one in the middle of the shop or the one next to the wall? A. The one in the middle of the shop. Not that far truss, it is this near truss. There is no wall there. 129

Those columns divide the shop in two.

Q. This one is against the wall? A. Yes, sir.

Q. And you worked on the one which was away from the wall? A. Away from the wall, yes, sir.

Q. And you stood on the platform? A. Yes, sir.

130 Q. A movable platform which had been built? A. Yes, sir.

Q. A staging; scaffold? A. Yes, sir.

Q. And you were on the outside of the truss? A. Yes, sir, the outside.

Q. Working? A. Yes, sir.

Q. At the time of the accident? A. Yes, sir.

Q. In other words you weren't between the two trusses? A. No.

Q. At the time of the accident? A. No.

Q. Does this electric crane extend beyond the top of the truss? A. It had been standing about ten or fifteen feet away—

131 Q. Does the top of the crane extend beyond the top of the truss? A. Yes, sir.

Q. Do you understand me? It doesn't stick out here? A. No.

Q. I mean this crane doesn't stick beyond the truss? A. No, not over the side, no.

Q. In order to observe where your holes were coming through on the inside of the truss you stepped upon the bottom flange of the truss, did you? A. No, I stepped up on the flange to see if I couldn't get any way to get in the other holes for the second hanger.

Q. Did you step on this flange, on the outside
132 flange of the bottom of the truss, so as to raise your body up to enable you to look over the top of the truss and over on the other side? A. Yes, sir.

Q. You didn't have to raise yourself very much, did you? A. No, my head and shoulders were above the top of the truss.

Q. I simply judge that from the result of your accident? A. Yes, sir.

Q. When you stood in that position to look over, your right arm was nearest the crane as the crane was standing? A. Yes, sir, that was next to the crane.

Q. So when the crane hit you it cut off your right arm first? A. Yes, sir. 133

Q. And when that struck you and cut off your right arm, the shock and the emergency of the situation in that condition, you threw your left hand out to catch yourself up on the top of the truss and on the track, and the crane wheels continued and stopped on top of that left arm, crushing it? A. Yes, sir, on top of the left arm.

Q. Crushing your arm? A. Yes, sir.

Q. And bench on which you worked in the shop previous to the accident, was located near this crane you say? A. It was on the far side of the shop directly opposite to where I got hurt. 134

Q. How far from the bench? A. Perhaps ten yards, about thirty feet.

Q. During all the time that you had worked there this crane had been in operation? A. Yes, sir.

Q. And you had observed it going up and down the shop? A. Yes, sir.

Q. On the day you were hurt it had been up and down there several times before you were hurt. Was it operated, so far as speed and methods were concerned, the same as it had been previously? A. Yes, just the same.

The Court: How fast did it move? 135

The Witness: That would be according to the weight it would be carrying. If it wasn't carrying any weight it would go with a good speed, but whenever it had a weight on it moved slowly.

The Court: Do you know whether it had a weight on at the time you met with your injury?

The Witness: No, I do not.

136 Q. The body of the truss, of this outside truss upon which you were working, was between you and the man who was operating the crane at the time you were hurt? A. Yes, sir.

Q. Except that you could see him because you were looking over this truss? A. Yes, sir.

Q. The other two men who were engaged upon the other platform or scaffolding that morning, and who were working upon the other piece of shafting which was to be fastened on the stringer which ran between the two outside trusses, they were working on top of this platform and were between the two trusses and under the crane? A.
137 Yes, sir.

Q. And when the crane moved up and down the shop it passed over those men? A. They would have to duck.

Q. In order to get out of the way of it they would have to bend down somewhat? A. Yes, sir, almost lie flat on top of the scaffolding.

Q. The top of the scaffold cannot come above this (illustrating on model)? A. You would have to bend down a good ways or it wouldn't clear them, because there is such a belly in the crane.

The Court: How frequently did the crane go back and forth as you worked there that
138 morning?

The Witness: Perhaps ten or fifteen times it had passed me.

The Court: Was it ten or fifteen times from half past seven until ten o'clock?

The Witness: Yes, sir.

The Court: Was it at regular intervals?

The Witness: No, just as it was required on the other machines. Over this crane are shaping machines, planing machines, etc.

The Court: How long before ten o'clock had the crane gone by?

The Witness: I would say it passed me ten minutes before that. 139

The Court: It had gone to one end of the shop?

The Witness: Yes, to the right hand of the shop. It was stationary until it would be called again.

The Court: When it went by you ten minutes before you were hurt, do you mean that it went by you and came back again?

The Witness: No, it went back and remained stationary.

The Court: How long before that had it passed you? 140

The Witness: Perhaps it had been another ten minutes before that, going down the shop to transport something.

The Court: That was the way it was going back and forth?

The Witness: Yes, sir.

Q. There was no regular movement of the crane, but they moved it at any time? A. Yes, sir.

The Court: Did it make a noise?

The Witness: It would make a noise, but this noise would be drowned by the other machinery in the place.

The Court: There was other machinery running at the time? 141

The Witness: Yes, milling machines, planing machines, and lathes.

Q. Do you remember how far from your platform or scaffold the other platform or scaffold was that morning?

The Court: What other platform?

Mr. Thomson: There were two of these scaffolds on each of which two men were

142 working. On the outside scaffold was Mr. Shanks and his helper, and on the inside scaffold were two other workers.

Q. How far apart were those scaffolds? A. About fifteen feet; about five yards.

Q. Were they opposite each other? A. No, mine was a good bit to this side; their's was further to the left.

Q. About how many feet? A. I would say about two or three feet.

Q. Two or three feet further to your left? A. Yes, sir.

Q. As you faced the crane? A. Yes, sir.

143 Q. And about how far away? A. I would say about fifteen feet away, about five or six yards.

Q. And the crane came from the right at the time you were hurt? A. Yes, sir, it came over my right hand first.

Q. When you stood upon the flange and looked over the top of this truss, you could see these two men on the other platform? A. Yes, sir.

The Court: When they brought locomotives entire into that crane shop, did they come in on rails?

The Witness: Yes, sir, they came in on the rails and came onto a transfer table and were

144 transferred from this transfer table onto the rails into the shop.

The Court: Did you do any work on the locomotives themselves when they were brought in there into the crane shop?

The Witness: No, I had this other work to do, outside work.

The Court: If a locomotive ran, for instance, from Scranton to Hoboken, if such a locomotive came in there for repairs on the tracks under its own steam, or was

hauled in, you would not work on that locomotive, would you? 145

The Witness: Yes, sir, I would, I would get right into the piston valves.

The Court: Was some of the rush work done on the engines themselves?

The Witness: Yes, sir, that would come in in a rush.

The Court: But at times parts of the engines were sent to your shop?

The Witness: Yes, sir, sent from the round houses to the shops, yes, sir.

Q. Tell us about the width of the crane, or the distance between the two trusses upon which the crane ran? 146

The Court: Across the shop?

Mr. Thomson: Yes, sir.

Q. The distance between this truss and this truss, the two trusses upon which the wheels of the crane ran? A. I never measured it.

Q. Your best recollection? A. I never measured it up.

Q. Is it as far as from this rail to the wall?

The Court: Is it as far as across this room?

The Witness: Yes, it would be a little wider than across this room. 147

The Court: Fifty to seventy-five feet?

The Witness: Yes, sir.

Q. About what was the distance between the supporting pillars that supported these trusses, under the truss? I mean going lengthwise of the shop, in the direction in which the crane traveled? A. I would say about twenty feet; thirty feet; I wouldn't swear.

148 Q. Were they at regular intervals, these perpendicular pillars? A. Yes, sir.

Q. Do you know the capacity of this crane? A. No, I don't know the capacity.

Q. Do you know what it was supposed to carry, the maximum weight or lift? A. No.

Q. It was a good sized crane? A. Yes, sir.

Q. Mr. Shanks, you say you lived in Europe for a large part of your life, and traveled on the Continent as an agent for some business? A. Yes, sir.

Q. Engaged in the manufacture of machinery? A. Flax spinning machinery, machines for spin-
149 ning flax, hemp and jute.

Q. Do you know the name of that firm? A. Combe, Barbour & Combe, Limited, Belfast.

Q. They are located at Belfast, Ireland? A. Yes, sir.

Q. You worked for them how many years? A. Sixteen years.

Q. Are you familiar with a number of European languages? A. Yes, I speak French, German and Italian.

Q. Can you write them too? A. Enough to get on with.

Q. You picked these languages up in your travels? A. Yes, sir.

150 Q. Picked them up yourself? A. Yes, sir.

Q. You say you speak three languages besides English? A. Yes, sir, enough to get along with.

Q. Enough to get along with and do business? A. Yes, sir.

Q. When you were hired to work for the Lackawanna Railroad do you remember the man that employed you? A. Yes.

Q. What was his name? A. I had a letter of introduction to Mr. Barton, the master mechanic, and he sent me to Mr. Hawk.

Q. When did you see Mr. Barton? A. I had a 151
letter to him and I went to see him, and I am not sure whether Barton or someone else received my letter.

Q. Where was he? A. In his private office, in Clark's office.

Q. Where was that? A. In Kingsland, New Jersey.

Q. You went there with the letter of introduction and you had a talk with him there? A. Yes. Then he sent me to Mr. Hawk, the general foreman of the machine shops.

Q. And you went down to see Hawk at Kingsland? A. On Tuesday and was engaged right 152
away, yes, sir.

Q. And you were engaged right away there? A. Yes, sir, I started the following morning to work.

Q. Your work was entirely in the Kingsland shops, all the time? A. Yes, sir.

Q. And the main part of your work was at this bench? A. Yes, the main part of my work was at this bench.

Q. Were you, yourself, ever acquainted with the Compensation Act of New Jersey?

Mr. Shay: Objected to.

Q. Do you know anything about it?

153

Mr. Shay: Objected to.
The Court: Objection overruled.

A. Yes, sir.

Q. Do you know anything about it, Mr. Shanks? A. I know what the Claim Agent has told me.

Q. Was your attention ever called to it before the accident? A. No, sir, never called to it.

Q. At no time then, in the history of your employment, had you ever served any written notice upon the Lackawanna Railroad, or its em-

154 ployes or officers, that you refused to be covered, in substance that you refused to be covered by the terms of the Compensation Act? A. No, sir.

Q. You never served any such written notice? A. No, sir.

Q. Before the day of the accident had you ever been engaged in hanging any other shafting in the shop? A. Yes, sir, before the day of the accident, that morning about eleven o'clock, this under-foreman, Nelson, instructed me to go to Secaucus to take the dimensions for some shafting there, but as I couldn't get a connection by train, when I came back to the shop I was put to work at this
155 other job that the two men had been working at Sunday, that other shafting at the other scaffolding.

Q. Besides those occasions had you, from time to time, during your employment, during the years that you worked for the Lackawanna Railroad, been engaged from time to time in doing this shafting work? A. There never had been any of that work done during the time that I was there. My work was principally the rush work, and when not engaged in that way—

Q. I didn't know but what on this overtime work— A. On the overtime I might shift a pulley
156 or something like that at night.

Q. You had done that? A. Yes, sir.

Q. Had you done any other millwright work at all besides what you have described? A. No millwright work, no. Keep machines in repair, something like that.

Mr. Shay: With the defendant's admission in the answer that it is engaged in interstate commerce, the plaintiff rests.

Mr. Thomson: We do not admit in the answer that we were engaged in interstate

commerce on the occasion of this accident. 157
We are generally engaged in interstate commerce as a common carrier. That is a general allegation.

Mr. Thomson: I move to dismiss the complaint on the ground that the evidence shows, as matter of law, that the Federal statute does not apply, because he was not engaged in interstate commerce at the time of this accident, nor was the defendant engaged in interstate commerce at the time of this accident. And also on the ground that there is no evidence in the plaintiff's case to show that the accident was due to 158
any negligence or fault upon the part of the defendant, his employer, or any employee or agent or officer of the defendant. On the further ground that the evidence shows, as matter of law, that his injuries were caused wholly by his own negligence and carelessness.

The Court: Of course I am expressing no opinion on the merits of this case, as you twelve men understand.

As to the question whether the Federal statute applies or not, that is more or less of an interesting question. I am disposed 159
at this time to deny your motion. I will reserve that question for further investigation.

On the other questions, of course, as to negligence and contributory negligence, that ground for dismissal depends largely on whether it comes under the Federal statute. If it does not come under the Federal statute, it would not be so difficult to decide.

160 At any rate I will deny your motion at this time. I will investigate these matters later on. What I wish to do on the record is to reserve decision on these matters, but deny the motion at this time *pro forma* and give you an exception, so as to preserve your rights.

Mr. Thomson: I will add the further ground to my motion to dismiss the complaint, that the Supreme Court of the State of New York has no jurisdiction of the action.

The Court: You mean raising the ques-
161 tion of the New Jersey Compensation Act? Do you claim that he is a resident of New Jersey now?

Mr. Thomson: Yes, sir, he is still living there. And on the evidence, I mean.

The Court: Suppose, counselor, an injury occurs in a foreign State, and the defendant is a resident of the foreign State, and the plaintiff is a resident of the foreign State, what do you say as to that?

My Shay: The Court still has jurisdiction. The Act of 1908 was amended in 1910, so as to give—the Federal Act—

162 The Court: Leave the Federal Act out of the question. Suppose it was not a case arising under the Federal Act?

Mr. Shay: Under Section 1780, even though a plaintiff be a non-resident, and the defendant a non-resident, and even though the action arose without the State, still the plaintiff can sue the defendant if it is doing business here.

The Court: But is it admitted that the defendant is doing business in this State?

Mr. Thomson: Yes, we admit that our 163
principal place of business and our general offices are in New York City.

The Court: Motion denied.

Mr. Thomson: Exception.

FREDERICK A. NELSON, being duly sworn, testified as follows:

Direct examination by Mr. Thomson:

Q. Where do you live? A. Five hundred ten Union Street, West Hoboken, New Jersey.

Q. How old are you, Mr. Nelson? A. Thirty-eight years old. 164

Q. What is your business? A. I am assistant machine foreman.

Q. And for whom do you work? A. I am working for the Lackawanna Railroad.

Q Where do you work for them? A. Kingsland, New Jersey.

Q. How long have you worked there for them? A. About seven years.

Q. You are of course, personally acquainted with Shanks, the plaintiff in this action? A. Yes, sir.

Q. And you remember when he was working there in the shop? A. Yes, sir, I do. 165

Q. Were you a foreman over him? A. Yes, sir, I was.

Q. What particular line of department did you have charge of? A. I had charge of the millwright gang at that time.

Q. When he was working there by the bench who was his foreman; did he have another foreman over that part of the work? A. No, just about that time they took Mr. Shanks off, as he calls rush jobs, about a month previous to that, and he was turned

166 over to me in the millwright gang, being that one of these men was off that was accustomed to that rush work we put him on, just for that particular case.

Q. You were familiar with this electric crane which was in the shop? A. Yes, sir, quite so.

Q. You were not present in the shop, were you, when Mr. Shanks was hurt? A. No, sir. I was in the shop—

Q. You didn't see the accident? A. I didn't see the accident, no, sir.

Q. Have you measured that crane out there, and the trusses upon which it runs? A. Yes, sir.

167 Q. The various distances and dimensions of it? A. Yes, sir.

Q. How high are the trusses from the floor of the shop, the trusses upon which the wheels of the electric crane runs? In other words, what is the clearance between the bottom of the trusses and the floor? A. Eighteen feet.

Q. What is the distance between the wheels of the electric crane? A. Do you mean from a side view, the same as I am looking at it now?

Q. What is the distance between the two tracks upon which the wheels of the crane run? A. About fifty-three feet.

Q. That is about, you say? A. Yes, sir.

168 Q. Have you the exact measurement, or are you simply giving an estimate? A. I think it is fifty-three feet and seven inches. The blueprint is right there (counsel hands blueprint to witness). The span is fifty-three feet and seven inches from center rail to center rail.

Q. What is the distance between the centers of the wheels of this crane, the wheels which run on one track, on the same track? A. Eleven feet one inch.

Q. Where is the operator's box located on that crane? A. It is situated on one truss about twenty-seven feet away from the wheels, in the center of the crane. 169

Q. Was the operator's box moved at all in the operation of the crane except to travel with the crane? A. It only travels with the crane, it is stationary.

Q. It is hitched permanently to the place where it is fastened to the crane? A. Yes, sir.

Q. There is no lateral movement of the operator in his box? A. No, sir.

Q. He goes up and down the shop in a straight line parallel with the two trusses upon which the wheels run? A. Yes, sir. 170

Q. What is the clearance between the bottom of the operator's cage and the floor of the shop? A. About nine feet six inches from the bottom of the cage to the floor line.

Q. Does the operator in operating this crane sit or stand? A. He stands.

Q. How far would the bottom of his feet be, the soles of his shoes from the floor of the shop, where he was operating the crane? A. That would be about the same distance. There is two inches of flooring on the bottom of the cage.

Q. There would be a two-inch floor between him, that is, on the bottom of the cage in which he stands? A. Yes, sir. 171

Q. Were you with the photographer out there when they tried to get a picture of this crane? A. No, sir.

Q. What is the width of the truss upon which the wheels of the crane rest, the depth, measuring from the top to the bottom? From the floor of the shop towards the roof, in that direction, what is the width of the truss? A. Twenty-four inches.

Q. What is the width of the top flange of that

172 truss upon which the rail is fastened, upon which the wheels of the crane runs? A. You mean the top channel, where the rail rests on?

Q. Yes, measuring crosswise the top of that truss? A. Fifteen inches.

Q. What is the measurement of the bottom part of the truss across? A. Ten-and-a-half.

Q. Between the bottom plate and the top plate was the plate of the truss? A. Yes, sir.

Q. And the plate of the truss is about how thick? A. About three-quarters of an inch.

Q. Were there some angle irons and braces bolted to the sides of that plate? A. Yes, sir.

173 Q. Bolted to the top and bottom flanges? A. Yes, sir.

Q. Which makes the truss stiff? A. Yes, sir.

Q. Both trusses are of the same size? A. Yes, sir, both trusses are of the same construction and size.

Q. Does this crane make very much noise in the shop when it moves back and forth? A. It makes a little noise, but not much.

Q. Have you ever ridden on the crane? A. Yes, sir.

Q. Have you ever been on these trusses when the crane was running? Have you ever stood on this truss-work while the crane was being operated?

174 A. Yes, sir.

Q. Is there any vibration to the frame on which the crane rests when it runs along? A. Yes, sir, there is quite some.

Q. Does that vibration depend on the amount of weight carried? A. Yes, sir, it does.

Q. When does it vibrate more or less? A. It vibrates more with a heavy load than with the light crane only.

Q. What is the capacity of this crane? A. Fifteen tons.

Q. This crane was used for carrying driving 175
wheels of locomotives and such things, back and forth in the shop? A. This crane is used for all materials such as driving wheels, cylinders, or pistons, or anything.

The Court: Will it lift a locomotive?

The Witness: No, sir.

The Court: I thought the plaintiff said they lifted locomotives on it.

Mr. Thomson: I do not think the crane could lift a locomotive. They have larger makes of cranes.

The Court: I understood him to state that it lifted an entire locomotive. 176

Mr. Shay: Yes, sir.

The Court: So this crane was not able to lift an engine by itself?

The Witness: No, sir.

The Court: How much do locomotive engines weigh?

The Witness: Anywheres from 110 to 150 tons.

Q. What is the distance from the operator, from him to the truss on his left? A. From the center of the carriage where the operator stands is twenty-seven feet.

Q. Is the other truss, the back truss, equally 177
distant from the center? In other words is this cage directly in the center of the crane? A. Yes, sir.

Q. Did you superintend the construction of the two movable scaffolds which were used by the men that Sunday morning, on one of which Mr. Shanks stood when he was hurt? A. Yes, sir.

Q. When were those made? A. They were made about a month previous to the accident.

178 Q. Were they just alike? A. The two of them were alike, yes, sir.

Q. How high was the top of the platform of that scaffold from the floor? A. I ordered them sixteen feet high, but owing to the fact that we couldn't very well do our work properly, that is, hanging the countershaft being too high, I had some of it cut off, probably four to eight inches, I don't know which. They suited themselves about that.

Q. How high were they that morning of the accident when they were used? A. Anywheres from fifteen feet six to fifteen feet eight, something like that.

179 Q. That is your best judgment? A. Yes, sir, about that.

Q. About what was the dimension of the surface of the top of the scaffold or platform? A. They are four by six feet platforms.

Q. And in their construction they resembled a stool, did they not? A. Yes, sir.

Q. A four-legged stool? A. About the same as the model.

Q. What was the weight of the rail upon which the wheels of the crane ran? A. That is what they call an eighty-pound rail.

Q. It was a regular railroad rail? A. It was a

180 regular railroad rail, yes, sir.

Q. And the wheels of the crane have a double flange on them? A. Yes, sir.

Q. So that a small flange came down on each side of the rail? A. Yes, sir.

Q. How high was that rail, how deep would it be from the top of the rail to the base of the truss? A. Five inches high.

Q. The top of the rail was five inches higher than the top of the truss upon which it was fastened? A. Yes, sir.

Q. The electric crane, no part of it extended 181
over the edge of the trusses upon which it ran, the outside edges of the trusses, did it? A. No, sir, there was about five inches clearance.

Q. What? A. It is inside of the outside flange on top of the truss is about five to five and a half inches clearance.

Q. You mean it is five inches from the projection of the outside edge of the truss. If you projected a line from the outside edge of the truss there would be five inches clearance from that line to the body of the crane as it moves along? A. Yes, sir.

Q. A man standing on one of these movable plat- 182
forms, working on the base of the truss, on the bottom flange of the truss, standing outside the truss and not between the two trusses, but outside the truss, could not be struck by the electric crane as it moved back and forth, could he, in any way? A. No, sir.

Q. How much clearance was there between the top of the patform and the bottom of the truss? A. The bottom of the truss is eighteen feet, and I had patforms ordered sixteen, and they cut some of it off to accommodate the business.

Q. About two feet? A. Yes, sir, about two feet; between twenty-four and twenty-eight inches, 183
something like that.

Q. The job which Mr. Shanks was engaged on when he was hurt was to fasten a piece of shafting, was it not, to the lower flange of the truss? A. Yes, sir.

Q. And that is all he had to do? A. Yes, sir.

Q. It wasn't fastened to the body of the truss itself, all the work was done on the bottom flange of the truss, was it not? A. Yes, sir.

Q. So the shafting would hang beneath, under-

184 neath the bottom the truss, below the truss? A. Yes, sir.

Q. And long shafting belts were run down to the floor of the mill to the wheels of the machinery? A. Yes, sir.

Q. And there was no work for Shanks on top of the truss, or on the top flange of the truss, no construction work there for him to do? A. Not at the time of the accident.

Q. Nor at any time was there, in connection with this mill shafting? A. Well, there is. After the shafting is assembled underneath the truss there is what they call a shifter, a belt shifter, that
185 is the only thing what goes even with the top line of the truss.

Q. But that had not been put in yet, had it? A. No, sir.

Q. At the time of the accident that work had not been started, had it? A. No, sir, that had not been started.

Q. And the only way that Mr. Shanks could get hurt by this crane was to have him get his hands on this rail upon which the wheels run? A. Yes, sir.

Q. To get some of his body up on top of the truss where he could be struck or hurt by the oper-
186 ation of the crane? A. That is the only way.

Q. That is the only way he could get hurt with the crane? A. Yes, sir.

Q. If Mr. Shanks wanted to get inside of the truss from the outside of the truss, in order to examine the holes, he could have crawled under the truss, could he not? A. Yes, sir.

Q. There was a distance, a clearance enough between the bottom of the truss and the top of the platform upon which Shanks was working, for him to stoop and go under the truss? A. Yes, sir.

Q. So it was unnecessary for him to get on top of the truss or look over the top of it in his work? A. I don't think it was necessary, unless— 187

Q. Was it or was it not, as a matter of fact?

The Court: He said he could have done it the other way.

Cross examination by Mr. Shay:

Q. You weren't there at the time? A. No, sir.

Q. So you don't know what Mr. Shanks was doing at all, at the time he was hurt? A. No, sir, I left that to him and the machinists.

Q. You have been there seven years? A. Yes.

Q. And Mr. Shanks about a year and ten months? A. Not at the time of the accident I wasn't there seven years. 188

Q. At the time of the accident you were there longer than Shanks? A. Yes, sir, about five years.

Q. And for a year and ten months you remember his being there? A. Yes, sir.

Q. And he was always doing the same kind of work, he did the rush work? A. Well, no, not always.

Q. Wasn't he the only man that worked at the rush work bench? A. No.

Q. Who else worked at the rush bench? A. I forget the name of the party, but Mr. Shanks at that very particular case— 189

Q. I would like to have the name of the other man? There wasn't any, was there, Mr. Nelson, there wasn't any other man? A. On that piston job, on that rush work.

Q. At the rush bench? A. I don't recollect; probably there wasn't.

Q. But you found it convenient, about a month before this accident, to take him away from the rush bench and change his employment, didn't

190 you? A. He wasn't working there for me directly, if the change was made it was turned over to me.

Q. Mr. Bohler was his foreman? A. Yes, sir.

Q. Where were you sitting in this Court room before you took the witness stand? A. Over there.

Q. Who were you sitting there with, with Mr. Roe? A. No.

Q. You know Mr. Roe? A. Yes, sir.

Q. Were you sitting with Mr. Roe? A. No, sir.

Q. Were you talking with Mr. Roe this morning? A. No, sir.

191 Q. Were you sitting with Mr. Bray? You know Mr. Bray? A. That is the gentleman in Mr. Roe's office.

Q. Yes, the investigator in Mr. Roe's office? A. He was sitting in the row ahead of me.

Q. You were sitting right behind him when Shanks was testifying, weren't you? A. Not right behind him, no, sir, he was sitting to my left.

Q. When you came over here to testify you weren't going to testify to the fact that you took Mr. Shanks away from rush work, you didn't come here to testify to that, did you? A. I did what?

192 Q. When you came over here to testify you didn't think you were going to testify to the fact that you took Mr. Shanks from the rush bench a month before this accident? A. Why not?

Q. That is something that you thought of while you were in the court room, after talking with Mr. Bray? A. No, sir.

Q. Was Mr. Shanks' work satisfactory? A. Yes, sir.

Q. At the rush bench? A. Why, yes.

Q. And there was no reason why he should

be taken from that job, was there? A. That isn't 193
up to me, that was up to Mr. Bohler.

Q. Did Mr. Bohler tell you to do it? A. No, sir, Mr. Hawk is the general foreman.

Q. You say you were up on top of this truss work when the crane was being operated? A. Yes, sir.

Q. When was that? A. Many a time. As a matter of fact I put up all the machines that came in the shops. I was millwright.

Q. What was the occasion of your going on top of the truss work? A. Such as telling people what to do.

Q. Up on top of the truss work? A. Yes, sir.

Q. Was anyone working up there? A. No, sir. 194

Q. There was no one working up there so you didn't have to get up here and tell any one what to do? A. Mr. Shanks knows I was up there many a time.

Q. What were you doing up there? A. Such as directing the work where I wanted it.

Q. You said you went up here to ascertain whether there was any vibration, any movement when the crane was moved. Is that what you went up there for? A. No, I went up there looking over some work which had to be done, and while I was up there the crane moved.

Q. Was there any work being done up there? 195
A. I done some work there personally.

Q. As a matter of fact, wasn't all the work done down here in the bottom of the shop? A. You mean as a repair shop?

Q. Yes. A. Yes, sir.

Q. So it wasn't necessary for you to go up here at all, was it? A. It was on occasion, yes, sir, by shifting or assembling machinery.

Q. When assembling machinery what was the occasion of your going up there? A. Such as put-

196 ting in grinders, for instance, the water pipes had to be laid along there or stand up there.

Q. Did you have to walk along there or stand up there? A. I did, many a time, yes, sir.

Q. You say there was vibration when the crane moved? A. Yes, sir.

Q. And there was just a slight vibration when there was no weight being carried at all? A. Yes, sir.

Q. At the time Mr. Shanks was hurt, where were you? A. I was in the office, I believe.

Q. And you came out after the accident? A. Yes, sir.

197 Q. Had the crane been carrying anything at that time? A. Do you mean at the time Mr. Shanks was hurt?

Q. Yes, sir. A. That I couldn't say.

Q. You don't know whether he was moving with or without a load? A. No, sir, I do not.

Q. Mr. Nelson, this crane wasn't equipped with any warning signals at all, was it? A. No, sir.

Q. That the crane was going to move? A. No, sir.

Q. And this man, when he started to move the crane he never let anybody know he was coming, unless he happened to see them below, isn't that
198 so? A. Well, I guess that was the case.

Q. He would just shout, "Get out of the way," or something like that? A. Yes, sir, something like that.

Q. That was true at the time of the accident, there was no equipment there of any kind? A. No bell or anything; no, sir.

Q. What could have been used to sound a warning? A. There could have been an electric bell put on.

Q. But there wasn't any on? A. No, sir.

The Court: When you say the plaintiff was taken away from the rush work and put to work at some other bench, what sort of work was he doing there? 199

The Witness: Millwright work.

The Court: What do you mean by millwright work?

The Witness: Such as putting up countershafting and hangers, and putting up machinery, tools.

The Court: Do you mean that at this millwright work there was no repairing on locomotives or machines engaged in interstate traffic? 200

The Witness: This millwright work is simply in conjunction with the tools, such as bringing down tools or shifting them around to suit conditions.

The Court: Tools that were used in repairing the locomotives and cars?

The Witness: Yes, sir.

The Court: Do you mean to say that during that month that he was, as you say, removed to the millwright bench, that he didn't do any rush work?

The Witness: In this particular case he did; the day before.

The Court: He says he did it not only the day before, but that he did it on a number of occasions, that when he was doing millwright work he would be called to the rush work? 201

The Witness: That is right, yes, sir, but as Mr. Shanks stated this particular case, that is why I confined myself to this particular case.

Recess until 2 P. M.

202 FREDERICK A. NELSON, recalled:

By Mr. Thomson:

Q. Mr. Nelson, I call your attention to the construction of the two platforms or scaffolds which were used by the plaintiff, Mr. Shanks, in his work, and ask you how they got from the floor of the shop to the top of the platform? A. You mean how they got on top of the platform?

Q. Yes. A. I really don't know whether they got up by ladder or whether they used the rungs of the scaffold itself.

Mr. Thomson: The plaintiff concedes that
203 the scaffold was constructed with steps on the side like ladders, by which they could climb to the top of it.

The Court: The cage in which the man was who operated the crane, was that open or were there windows in it?

The Witness: No, sir, it is an open cage.

FRANK SALERNO, being duly sworn, testified as follows:

Direct examination by Mr. Thomson:

Q. Where do you live? A. 77 Brighton Avenue,
204 Passaic, New Jersey.

Q. What is your business? A. Just now I am working on a printing machine in an oilcloth company.

Q. Did you work for the Lackawanna Railroad in the Kingsland shops at one time? A. Yes, sir.

Q. Were you working there when Shanks received his injury? A. Yes, sir.

Q. Were you present that Sunday morning when he was hurt? A. Yes, sir.

Q. Where were you when the accident happened? 205
A. I was right in sight of the crane.

Q. Were you on top of one of these platforms? A. Yes, sir.

Q. Were you on top of the platform that stood between the two, in here? A. Yes, sir.

Q. And you were engaged in fastening to this inside framework a piece of shafting? A. Yes, sir.

Q. And you had a helper there with you, another man? A. Yes, sir, young Meyer.

Q. Did you start to work on that platform in the morning of that day? A. Yes, sir.

Q. Were you there on top of it until Mr. Shanks was hurt? A. Yes, sir. 206

Q. About two and a half hours? A. No, I started about a quarter to nine.

Q. What do you know about the accident as it occurred? A. Because I was there, and whatever happened to the job, that is all I seen.

Q. What first attracted you to Mr. Shanks when he was hurt? A. I seen the crane coming first thing, and I went down on my head, me and the other young fellow.

Q. You mean you bent down so that the crane could pass over you? A. Yes, sir. The other fellow he began to holler, and I looked over and I seen Shanks there hanging on a piece of stick, with 207
his arm, and one of his hands was down laying on the floor, and I tried to get from that platform, and I jumped right on the other platform. I took my belt off and I kept on tying his arms to stop it bleeding.

Q. The first thing that attracted your attention to Shanks you heard him cry out? A. I didn't hear him, but he was hollering too, but the rest of the other fellows were hollering.

Q. That is what attracted your attention to it?

208 A. Yes, sir, and I went right on and gave them a hand to take him down.

Q. How many times that morning had the crane passed over your head back and forth? A. I didn't take any notice, but I suppose it was around five or six times, or seven.

Q. You don't know exactly? A. No.

Q. But it had been over you, back and forth, several times? A. Yes, sir.

Mr. Shay: No questions.

SAMUEL PHILLIPS, being duly sworn, testi-
209 fied, as follows:

Direct examination by Mr. Thomson:

Q. Where do you live? A. 321 Milburn Avenue, Lindenhurst, New Jersey.

Q. Were you the operator of this electric crane in the Kingsland shop at the time the accident happened? A. Yes, sir.

Q. How long had you been operating that crane before the accident? A. Nearly three years.

Q. You had been employed by the Railroad Company to operate this electric crane? A. Yes, sir.

210 Q. And was that your whole work? A. Yes, sir.

Q. During that period of time did any other accident happen to any person because of the operation of the crane?

Mr. Shay: Objected to.

The Court: Objection overruled.

Mr. Shay: Exception.

A. No, sir.

Q. Was anybody else hurt besides Mr. Shanks during the years that you operated the crane, because of the operation of the crane?

Mr. Shay: Objected to.

Q. Or by the crane? 211

Mr. Shay: Objected to.

Q. Was anybody else hurt? A. No, in the time I was working there nobody was hurt.

Mr. Shay: Exception.

No Questions.

Mr. Thomson: If the Court please, I offer in evidence the Compensation Act of the State of New Jersey, which Mr. Shay said he would not object to because of the failure of proof, because he was satisfied 212 that was the law.

The Court: Laws of what year?

Mr. Thomson: The Law of the State of New Jersey, known as the Compensation Act, approved April 4th, 1911. And there is an amendment approved April 1st, 1913, but I do not think that applies to this case.

The Court: No, that does not apply.

Mr. Thomson: There is another amendment called a supplement to the Act, approved May 2nd, 1911. It is Chapter 95 213 of the Laws of 1911, of the State of New Jersey.

The Court: Does that include both the April 4th law and the May 2nd law?

Mr. Thomson: No, sir. Chapter 348 of the Laws of 1911. Those two acts were all that was passed in New Jersey relating to this question of compensation prior to this action.

Mr. Shay: Objected to on the ground that it is incompetent, immaterial and irrelevant.

214 The Court: If the Federal Employers' Liability Act did not apply to the plaintiff, he would then be relegated to the common law of the State of New Jersey?

Mr. Shay: Yes, sir.

The Court: As affected by this Act, if it was affected at all.

Mr. Shay: Yes, sir.

The Court: But if the Federal Act, the Federal Employers' Liability Act does apply to the plaintiff, what is your position with regard to that act then? Does that act have any application?

215 Mr. Thomson: There are parts of the act that have some application to the case, in my judgment. My associate knows more about that.

Mr. Shay: The Federal Act supersedes the State Act. The Federal Act applies to cases where men are engaged in Interstate Commerce; Congress has control over the employment of those men, and the State has nothing to do with them at all.

The Court: You say that the Federal Act, if it applies, governs to the exclusion of any State regulation?

216 Mr. Shay: Yes, sir.

The Court: The Federal Act, reading from the opinion of Judge Vanderventer, in Mondou *v.* The New York, New Haven and Hartford Railroad Company (reads).

The Court: At the outset of the trial I asked counsel—and I do not want to have any misunderstanding about it—the complaint in this action does not refer to this Federal Liability Law at all. I understand that both counsel agree that this action, while in the complaint there is no reference

to this act, that it is unnecessary to refer 217
to it.

Mr. Shay: Yes, sir.

The Court: Has it been so held?

Mr. Shay: Yes, sir, in Thornton's book on Employers' Liability Acts, Federal Employers' Liability Acts, holds it distinctly, citing several cases. The only necessary allegations are these—

The Court: The allegations that it was interstate commerce, without referring to this act. It has been decided by some Court?

Mr. Shay: Yes, sir. 218

The Court: There is no such question before me?

Mr. Shay: No question raised before your Honor on the pleadings or won't be, as to the sufficiency of the pleadings.

The Court: Is it specifically provided in the State of New Jersey what the compensation would be for an injury of this kind?

Mr. Thomson: Yes, sir, between $3,500 and $4,000.

Mr. Shay: It is a certain weekly payment.

The Court: What is the aggregate, some- 219
where between $3,500 and $4,000? Is there a lump sum provided?

Mr. Thomson: It is not a lump sum, but it may be computed into a lump sum, and the computation of that lump sum brings it between $3,500 and $4,000.

The Court: Is that agreed to?

Mr. Shay: Yes, sir.

The Court: I will take this act, and I will pass on whether it applies to this case or not, subsequently, if it becomes necessary

220 to do so, and I will give the plaintiff an exception.

Admitted in evidence and marked Defendant's Exhibit "1."

Mr. Shay: You withhold your ruling to my objection to the introduction of the Compensation Act?

The Court: I will take the Compensation Act, but I will pass on whether it applies to this case if it becomes necessary. That is a matter of law.

Mr. Thomson: And the New Jersey Acts are admitted in evidence.

221 The Court: Yes.

Mr. Shay: Exception.

Defendant Rests.

BRUCE SHANKS, recalled:

By Mr. Shay:

Q. Mr. Shanks, Mr. Nelson was called as a witness here and testified that you were taken off the rush work about a month before the date of this accident. Is that true? A. No, sir, I was on that to the very last day.

222 Q. And you weren't taken off? A. No, sir. As a matter of fact other men working at other jobs were put on the millwright work.

Plaintiff Rests.

Mr. Thomson: I renew the motion to dismiss the complaint at this time, which I made at the close of the plaintiff's case, upon all the grounds, the same grounds that I recited then, and on the further ground that the Federal Act in so far as it applies,

may be held to be applied in its wording 223
to the issues in this action, is unconstitutional and in violation of the fifth amendment of the United States Constitution, and the fourteenth amendment, in that it deprives the defendant of its property without due process of law, and destroys the privileges and immunities of the defendant, and that the defendant does not have the equal protection of the law.

The Court: In this case, I will take a special verdict and pass on the legal points involved later on, if it becomes necessary.

Mr. Shay: There will be no general ver- 224
dict?

The Court: Not until after the jury answers the questions propounded to them.

Mr. Thomson: I wish to add the additional ground to my motion to dismiss the complaint, that by virtue of the New Jersey Acts, which are in evidence, the Supreme Court of the State of New York has no jurisdiction in the case.

The Court: I will pass on all those points after taking the special verdict, as to negligence and contributory negligence, and if those are found in favor of the 225
plaintiff, the amount of compensation to be paid. The issues to go to the jury are the question whether this man, in view of Mr. Nelson's testimony that he had been removed from the rush work to some other class of work, if that question is at issue I suppose I should submit that to the jury, whether at this time he was engaged in rush work, in work on locomotives used in Interstate traffic, under the language of the Court in the Peterson and Mondou cases.

226 Mr. Thomson: We do not want to raise that issue with the plaintiff. The plaintiff knows what work he was doing better than anybody else, and we don't care, because the witness testified to that on the stand, as he understood it, to raise any issue of fact in this case in relation to Mr. Shanks' work, what the work was and what he did, we are contented to be bound by the plaintiff's own story of the work he was doing —in fact we prefer to be.

The Court: That leaves negligence, contributory negligence, and the amount of
227 damages, in the present status of the case?

Mr. Thomson: Yes, sir.

The Court: I call your attention to the fact that neither of you has introduced in evidence the model.

Mr. Thomson: It is not drawn to scale, and we did not introduce it. We just used it for illustrative purposes.

The Charge of the Court.

KELLY, J.:

228 Gentlemen of the Jury:

In this case I am taking what is called a special verdict, I will give you three or four questions to answer. You will take the paper with these questions on it with you to your jury-room, and you will write your answers on that paper and bring it back to the Court. As you doubtless appreciate, this case is full of legal questions, which have been discussed before you, but with which, fortunately for yourselves, you have

nothing to do. There are certain questions of fact 229
that are submitted to you under the law of the land, and those questions are, as follows:

1. Were the plaintiff's injuries the result of negligence of the defendant, or of any of the officers, agents, or employes of said defendant, or by reason of any defect or insufficiency in its appliances, machinery, works or equipment? Answer.

You will say "Yes" or "No," according to the evidence. If the jury answers the above question in the negative, if you say "No, this injury was not caused by any negligence on the part of the defendant, that ends the case, you need not go any further. If the jury answers the above question in the negative, they need proceed no further. If the jury answers the foregoing question in the affirmative, that is, if you say "Yes" in answer to that, then you will answer the following question: 230

2. Was the plaintiff himself free from contributory negligence? Did he act as a reasonably prudent man would have acted? Answer.

That is, did Shanks, the plaintiff here, act carefully? You will answer that "Yes" or "No."

Under the law of the State of New York, if a man is guilty of contributory negligence, as it is 231
called, no matter how careless the employer may be, if the man himself was careless, he cannot recover. But this action is prosecuted under an Act of Congress, a Federal law, which provides that contributory negligence of itself does not bar the right of action. "The fact that the employe may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributed to the employe."

There is no such law in our State tribunals,

232 but it has been the law in the Federal Courts, the United States Courts, for a number of years, in a great many classes of actions. If you say that the man's injuries were occasioned by the negligence of the Railroad Company, if you say he was not negligent himself, if he was not guilty of contributory negligence, then you do not have to bother about it. But if you say that he was guilty of contributory negligence, if the jury find that the plaintiff himself was guilty of negligence contributing to his injury, the damages must be diminished by the jury in proportion to the amount of negligence attributed to the plaintiff.

233 Then the last question:

3. What sum is reasonable compensation for the damage sustained by the plaintiff? If you say they are liable. If you say he was careless himself, then under the Act of Congress, which is binding on us all,—because the Laws of the United States are binding on us just the same as the Laws of the State of New York,—if you say he was careless, instead of throwing his action out of Court altogether, you will use your good common sense on it and make such reduction in the verdict which you would otherwise give him, as you say is right, in proportion to his carelessness.

234 How will you decide these questions? It is not enough for the plaintiff to prove that he was hurt. There is no dispute but that this man was hurt, and that he received a very serious and permanent injury. Before he can recover he must prove not only that he was hurt, but that he was hurt through carelessness on the part of his employers. If he does not prove that, he cannot recover.

You have heard it said that under a law of the State of New Jersey there is an act by which men who are injured while in the service of another are

compensated whether the employer has been negligent or not; in other words, according to the popular saying, they make the business pay for the injury. I had occasion to remark to juries this week, probably in your hearing, that there are two sides to this question of compensation. We have had an exhibition of it right here. Some of the people who are going around shouting for compensation acts, etc., do not stop to think. I am not saying that compensation acts are not a good thing, it is not for me to pass on that question, I have enough troubles of my own without passing on legislative matters. Our own State Legislature has passed a compensation act. Under the compensation act of the State of New Jersey, for instance, this plaintiff would be entitled to recover, if he was suing under that act, whether the Railroad Company was careless or not, but he would be entitled to recover a much smaller sum than he is suing for here. The point is that under this case, as it has been submitted to you, he cannot recover unless he proves to you, by a fair preponderance of the testimony, that he was injured through the carelessness of his employers, or of some of the employees of the Railroad Company, or because, as the Act of Congress says, by reason of any defect or insufficiency in the equipment or appliances furnished to him by his employers. 235 236 237

You have heard the story of what he was employed to do, what work he was doing, and how this accident happened. He was working in or about the rails on which this electric crane moved back and forth. He was there by direction of his employers or foreman, in the performance of his work. This employee who was working the electric crane was also doing the work of the defendants, and this electric crane was moved back and forth in the vicinity of the place where this plaintiff was en-

238 gaged at work. If the situation presented to him was such that a reasonably prudent man, viewing the operation of the traveling crane back and forth, should have anticipated injury, that injury might result to these men who were working in or about that place, then the master was obliged to take reasonable precautions to see that these men were protected. He was not the insurer of their safety, he did not guarantee that they would not meet with accident, but he was obliged to take notice of the situation, and if a reasonable man looking at the work which was carried on here would say: "These men are working in such a place that they
239 might be injured by this movable crane," if that was the situation, then the Railroad Company was obliged to take notice of it and use reasonable precautions to see that the man was not injured. The claim of the plaintiff is that they did not observe those reasonable precautions, that they were careless in the way in which they transacted their business. He says that this traveling crane was operated without notice to him, and came down on him and crushed his hands without word or warning. He said that he had been working there during the day of the accident, that he was working there by direction of his foreman, who was one of the em-
240 ployees or superintendents of this Railroad Company, and that the foreman or the man in charge, and the man running the electric crane, saw him working there for these hours, and that they should have taken notice of the fact that he was there in the way, or watched out to see whether he was there or not, and given him warning before they ran this electric crane along the tracks, as they were running it at that time. I will leave it to you to say. You have had the situation explained to you, and you have heard the story told on both sides. I do not understand that there is any claim that there

was any warning given by word of mouth, or by bell or whistle, as this crane came along. It is said that the plaintiff could have seen the crane, and that the man operating the crane could have seen the plaintiff. That is a matter to be considered by you; it works both ways. If the man operating the crane could have seen his fellow workman up on that bar, or should have known that he was working there, and you say that he was careless in not seeing him, or in not knowing that he was there, or in not giving him any warning, and running this crane over his hands, as the testimony is, that would justify you in saying that the defendant was careless, because under this Federal law the Railroad Company is responsible for the negligence of its employees towards one another. That is not so under our State law either. But if he was injured through the carelessness of the man who was running the crane, if you say that man was careless in not shouting or giving him warning of some kind, or if you say the defendant was careless in not having some mechanical means of warning him, by bell, whistle, or otherwise, if you say that was the fact, that would justify you in saying that the defendant was negligent. That is the question I am leaving to you.

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The man who operated the crane says he never had an accident before, but that is not conclusive. Of course, if you say it was an accident which they should not have apprehended, they are not responsible simply because an accident happens, accidents happen every year for which no one is responsible, and sometimes they happen through the fault of the man injured.

243

Before you can find the defendant guilty of negligence, you must say of the railroad company or its employees, whether the man in the box or the people who had charge of this shop, that they were

244 guilty of carelessness. Unless you find carelessness on the part of the defendant or its employees, you cannot find the Railroad Company liable. If you say that they were not careless, that is the end of the case, the plaintiff cannot recover. Suppose you say they were careless? That is not enough, you must then say was this plaintiff himself free from negligence, you must pass on that question, and while it is not a bar to his action, you must say whether or not he was careless. The plaintiff is a man of intelligence, and he was obliged to use reasonable care. He was obliged to keep his eyes open and take notice of
245 the surroundings. He was working at a place where this heavy crane moved back and forth continually, he says it passed by him a number of times that morning while he was working there, and that it had passed by him, I think he said, ten minutes before the accident, with the wheels revolving on those tracks. The plaintiff's story is that as he leaned over this truss to see whether the holes were in proper position, that the crane at that time was stationary. That is my recollection of the testimony, but do not take the evidence from me, you must recollect it. Did he act as a reasonably prudent man should have acted?
246 Should he have anticipated, from his knowledge of the situation, that this crane moving back and forth might come down on him and injure his hands, injure his body, kill him perhaps? It is claimed here on behalf of the defendant that he could have done this work by putting his body under this girder instead of putting his body over it. Did he look at this crane? He says he looked at it and that it was stationary. Did he look? Was it stationary? Should he have heard it start? Should he have heard it come on whether it gave

a warning or not? I am now considering his negligence, if any, which is entirely separate from the defendant's negligence, if the defendant was at all negligent. I leave it to you to say, bearing in mind that you must judge the plaintiff by the situation as it appeared to him before the accident happened, because if we look back on these things, from the view of the plaintiff or defendant, we can always see how the accident could have been avoided. That would not be fair to Shanks any more than it would be to the defendant. Shanks was obliged to use the degree of care and caution that a reasonably prudent man, engaged as he was, should have used. That is a question for twelve men to decide, under the law applicable to this case, and I am leaving it to you to say if he did all that a reasonably prudent man should have done while engaged in this work. He was rightfully in the neighborhood of that truss, he was doing work for the defendant, but even at that he must use care. If you say that he did use the care which a reasonably prudent man should have used, that ends the question of contributory negligence. If you say that he was guilty of contributory negligence, that does not bar him from a recovery in this action, but it is a matter for you to consider in passing on the question of damages. 247 248 249

Gentlemen, on the question of damages all that I can say to you is this: This man has met with a serious injury. He is a comparatively young man, forty-two years of age. He was earning $17 a week at the time of the accident. It goes without saying that he has done no work since the accident; he has lost both hands. He says he is helpless to a great extent. By the use of some artificial appliance he can feed himself; I think he said he had a fork strapped to his arm. That is a make-

250 shift, but it is better than nothing. He is an intelligent man, I think he said he speaks three languages. He is not as helpless as some men might be who met with this very deplorable misfortune, but there is no gainsaying that he met with a very severe and permanent injury. If you find this defendant liable for this accident, it calls for the exercise of your good common sense. We do not maintain Courts and juries to be liberal or generous. Money is just as important here to-day as it will be when you go back to your various occupations at the end of your jury service. He must get whatever he is entitled to here; this is the only
251 place he can get it; he cannot come back later on and get more. Do right by him now, this is his day in Court, if he is entitled to recover anything, about which I express no opinion. But I want to caution you in this case, as in all cases, to use your good common sense on these things. We are not here to punish people. It is not as if this accident was deliberate or willful. Accidents happen, and Courts and juries are not organized for the purpose of punishing people, but to make good to the party injured, as far as money is concerned, the loss they have sustained. Do not be carried away by passion, or prejudice or sympathy. Mr. Shanks
252 and the Railroad Company have picked you out to decide this case for them, and if you come to the question of damages do right by him and do right by the Railroad Company, not too much and not too little.

Gentlemen those are the rules of law that apply to this case. It is brought under the Federal Act, under an Act of Congress, which is different from our own State law, as I have explained to you.

Take these questions with you and render a verdict. If you say that Shanks has not proved

that the defendant was negligent—the burden of proof is on him to show that—if he has not convinced you of that by a fair preponderance of the testimony, the defendant is entitled to a verdict. If he has convinced you of that, then you come to the question of damages, applying the rules that I have stated to you. 253

Anything else, gentlemen?

Mr. Thomson: I desire to except to the charge in so far as you submit to the jury the question of whether or not the operator in the cage in running the crane had any duty towards the plaintiff who stood upon the top of the platform outside the truss, and outside, as we say, of the zone of danger. 254

The Court: I said if the operator knew or should have known that he was there and exposed to danger. Of course, if the operator did not know or should not have known that he was there, then there was no obligation on him.

Mr. Thomson: The evidence shows mathematically the position of the cage and the plaintiff's position.

The Court: Do not argue it.

Mr. Thomson: I call your attention to the fact that the truss must have been between the body—

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The Court: I do not want to hear any argument. I qualified my charge by saying that so far as the man in the cage is concerned you cannot find him guilty of negligence unless you say that he knew or should have known that this man was working there.

Mr. Thomson: I ask your Honor to charge the jury that there is no evidence in the case that Mr. Shanks, the plaintiff, was in any danger from the operation of the crane during the two and a

256 half hours he worked there that morning except in the single instance when he was injured.

The Court: I do not know whether he was in danger of being injured; there is no evidence that he was injured before this accident.

Mr. Thomson: I ask your Honor to charge the jury that there is no evidence that he was in danger of being injured except on this one occasion.

The Court: He was in no danger of being injured so long as he did not get in front of the crane, or get under the wheels of the crane. If he stood outside of the truss he was out of
257 reach of the crane. The only time he was injured was when he got under the wheels of the crane.

Mr. Thomson: The evidence is that he only got under this crane once.

The Court: The jury must remember the evidence. I decline to charge except as I have already charged on the subject.

Mr. Thomson: Exception. I ask the Court to charge the jury that the plaintiff was bound as between going under the truss or getting up on top of it, that if by getting under the truss was safe, as it was, that he was bound to go in that
258 way and use the safe way instead of the dangerous way.

The Court: If there was one way that was safe and one way that was dangerous, and he appreciated that one way was safe and the other way was dangerous, he was bound to use the safe way undoubtedly. If one way was safe and the other way was dangerous he ought to have used the safe way. I leave it to the jury to say whether he exercised due care.

Mr. Thompson: Exception. I ask the Court to

charge the jury that it was perfectly safe under the truss, as a matter of law. 259

The Court: Yes, that is right.

Mr. Thomson: And that it was dangerous to go on top of the truss, as matter of law.

The Court: It was dangerous if the crane came down on him. There is no question as to that.

Mr. Thomson: It did.

The Court: It was dangerous if the crane came down on you. If the crane was not there it would not be.

Mr. Thomson: I request the Court to charge the jury that under the New Jersey Compensation Act that the maximum amount that the plaintiff can recover, even under the Federal Act, is the amount of compensation awarded by the New Jersey Act. 260

The Court: I decline to charge on that subject except as I have already charged.

Mr. Thomson: Exception. May I have an exception to all the refusals to charge?

The Court: Yes.

Mr. Thomson: I understand the Court has reserved decision as to whether to grant any of the motions in the case until after the rendition of the verdict?

The Court: Yes.

The jury returned into the court room. 261

The Court: I have an inquiry from the jury with reference to the questions that I propounded to them. It is in the following language: "On question No. 2 jury wishes to know if two answers are all right?" I do not understand that. What do you mean?

Foreman of Jury: The question is whether he was guilty of contributory negligence. The first part he might be guilty to a slight degree, but in the second part of the question they think he may

262 have acted as a reasonably prudent man. However, the answer to the first question would be "No" and to the second "Yes."

The Court: If he acted as a reasonably prudent man should have done, then he was not guilty of contributory negligence. A man who acts as a reasonably prudent man would have acted is not guilty of contributory negligence.

Foreman of Jury: The jury did not understand that.

The Court: As long as a man acts as a reasonably prudent man would have acted under the circumstances, situated as he was, then he is not guilty of contributory negligence. If he did not act that
263 way, if he did something that a reasonably prudent man would not have done under the circumstances, then he was guilty of negligence.

A Juror: We would like to have the model.

The Court: The model was not admitted in evidence. What do you want to know?

A Juror: The height of the scaffolding.

The Court: I think the plaintiff gave us some figures, which I will refer to in a minute. Nelson, the man that had the blueprint, said that the truss on which the track ran, the bottom of it was eighteen feet from the floor. The width of the crane, fifty-three feet seven inches, the span from center
264 line to center line. From center wheel to center wheel of the crane on the track, eleven feet one inch. The bottom of the crane box, the thing the man sat in, nine feet six inches from the floor. The platform top, four by six feet.

You want to know the space between the top of the platform and the bottom of the crane?

A Juror: Yes, sir.

The Court: Mr. Shanks was asked that question.

A Juror: The space that he had clear there.

The Court: When he stood on top of the platform? 265

A Juror: Yes, sir.

The Court: Mr. Shanks' testimony was that it was about fourteen or fifteen inches from the bottom of the truss to the platform, but Mr. Nelson, I think, as I recollect it, put it a little more than that, he put it at about two feet. He said the platforms were made of a certain height, and that they cut a few inches off. Mr. Nelson told us the height that he ordered those platforms built, but he said that after they were built there was a few inches cut from underneath them, as I recall his testimony. It was eighteen feet from the floor to the bottom of the truss, and I think he said the platforms were sixteen feet something. 266

A Juror: Sixteen feet.

The Court: My recollection is that Nelson said that there was a few inches more space between the platforms and the bottom of the truss than what Shanks testified to. Do not take my recollection of the evidence, you must recollect it yourselves.

You may retire, gentlemen.

The jury returned into the court room.

The Court: The jury answers the questions propounded by the Court, as follows: 267

1. Were the plaintiff's injuries the result of negligence of the defendant, or of any of the officers, agents, or employees of said defendant, or by reason of any defect or insufficiency in its appliances, machinery, works, or equipment?

Answer: Yes.

2. Was the plaintiff himself free from contributory negligence? Did he act as a reasonably prudent man would have acted?

Answer: Yes.

268 3. What sum is reasonable compensation for the damage sustained by plaintiff? Answer: $40,000.

The paper submitted by the Court to the jury, on which the foregoing answers were made, was as follows:

The jury will answer the following questions:

1. Were the plaintiff's injuries the result of negligence of the defendant, or of any of the officers, agents, or employees of said defendant, or by reason of any defect or insufficiency in its appliances, machinery, works or equipment? Answer:

If the jury answers the above question in the
269 negative, they need proceed no further. If the jury answers the foregoing question in the affirmative, they will then answer the following questions:

2. Was the plaintiff himself free from contributory negligence? Did he act as a reasonably prudent man would have acted? Answer:

3. What sum is reasonable compensation for the damage sustained by plaintiff?

If the jury find that the plaintiff himself was guilty of negligence contributing to the injury, the damages must be diminished by the jury in proportion to the amount of negligence attributed to plain-
270 tiff.

The Court: On the coming in of the special verdict you are renewing your motion to dismiss the complaint, and he is now moving for the direction of a general verdict for $40,000.

I reserve decision of both of those motions.

Mr. Thomson: All my rights are preserved?

The Court: Yes, I do not think you need take exceptions until after those motions have been decided.

Defendant's Exhibit I. 271

CHAPTER 95, LAWS OF 1911.

AN ACT
prescribing the
Liability of an Employer to Make Compensation
for Injuries Received by an Employe
in the Course of Employment,
establishing
An Elective Schedule of Compensation, and Regulating Procedure for the Determination
of Liability and Compensation Thereunder. Approved April 4, 1911
To which is appended a
Supplement to the "Liability Act" Approved May 272
2, 1911.

Be it enacted by the Senate and General Assembly of the State of New Jersey:

Section I. Compensation by action at law.

1. When personal injury is caused to an employe by accident arising out of and in the course of his employment, of which the actual or lawfully imputed negligence of the employer is the natural and proximate cause, he shall receive compensation therefor from his employer, provided the employe was himself not wilfully negligent at the time of receiving such injury, and the question of 273
whether the employe was willfully negligent shall be one of fact to be submitted to the jury, subject to the usual superintending powers of a court to set aside a verdict rendered contrary to the evidence.

(The following side-notes were printed with above paragraph): "Employe entitled to compensation for accident or injury." "Fact determined by jury."

274 2. The right to compensation as provided by section I of this act shall not be defeated upon the ground that the injury was caused in any degree by the negligence of a fellow employe; or that the injured employe assumed the risks inherent in or incidental to or arising out of his employment or arising from the failure of the employer to provide and maintain safe premises and suitable appliances; which said grounds of defense are hereby abolished.

(The following side-note was printed with above paragraph): "Certain pleas abolished."

275 3. If an employer enters into a contract, written or verbal, with an independent contractor to do part of such employer's work, or if such contractor enters into a contract, written or verbal, with a subcontractor to do all or any part of such work comprised in such contractor's contract with the employer, such contract or subcontract shall not bar the liability of the employer under this act for injury caused to an employe of such contractor or subcontractor by any defect in the condition of the ways, works, machinery or plant if the defect arose or had not been discovered and remedied through the negligence of the employer or some one entrusted by him with the duty of
276 seeing that they were in proper condition. This paragraph shall apply only to actions arising under section one.

(The following side-note was printed with above paragraph): "Contract not to bar liability."

4. The provisions of paragraphs one, two and three shall apply to any claim for the death of an employe arising under an act entitled "An act to provide for the recovery of damages in cases where the death of a person is caused by wrongful act,

neglect or default," approved March third, eighteen hundred and forty-eight, and the amendments thereof and supplements thereto. 277

(The following side-note was printed with above paragraph): "Application of act in case of death."

5. In all actions at law brought prusuant to section I of this act, the burden of proof to establish willful negligence in the injured employe shall be upon the defendant.

(The following side-note was printed with above paragraph): "Burden of proof on defendant."

6. No claim for legal services or disbursements pertaining to any demand made or suit brought under the provisions of this act shall be an enforceable lien against the amount paid as compensation, unless the same be approved in writing by the judge or justice presiding at the trial, or in case of settlement without trial, by the judge of the circuit court of the district in which such issue arose; provided, that if notice in writing be given the defendant of such claim for legal services or disbursements, the same shall be a lien against the amount paid as compensation, subject to determination of the amount and approval hereinbefore provided. 278

(The following side-notes were printed with above paragraph): "Claim against compensation." "Proviso." 279

Section II. Elective compensation.

7. When employer and employe shall by agreement, either express or implied, as hereinafter provided, accept the provisions of section II of this act, compensation for personal injuries to or for the death of such employe by accident arising out of and in the course of his em-

280 ployment shall be made by the employer without regard to the negligence of the employer, according to the schedule contained in paragraph eleven, in all cases except when the injury or death is intentionally self-inflicted, or when intoxication is the natural and proximate cause of injury, and the burden of proof of such fact shall be upon the employer.

(The following side-notes were printed with above paragraph): "Compensation under agreement." "Exceptions."

8. Such agreement shall be a surrender by the
281 parties thereto of their rights to any other method, form or amount of compensation or determination thereof than as provided in section II of this act, and an acceptance of all the provisions of section II of this act, and shall bind the employe himself and for compensation for his death shall bind his personal representatives, his widow and next of kin, as well as the employer, and those conducting his business during bankruptcy or insolvency.

(The following side-note was printed with above paragraph): "Agreement deemed surrender of rights to other method."

9. Every contract of hiring made subsequent to
282 the time provided for this act to take effect shall be presumed to have been made with reference to the provisions of section II of this act, and unless there be as a part of such contract an express statement in writing, prior to any accident, either in the contract itself or by written notice from either party to the other, that the provisions of section II of this act, are not intended to apply, then it shall be presumed that the parties have accepted the provisions of section II of this act and have agreed to be bound thereby. In the employment of minors, sec-

tion II shall be presumed to apply unless the notice 283
be given by or to the parent or guardian of the minor.

(The following side-note was printed with above paragraph): "Employment subject to this act."

10. The contract for the operation of the provisions of section II of this act may be terminated by either party upon sixty days' notice in writing prior to any accident.

(The following side-note was printed with above paragraph): "Termination of contract."

11. Following is the schedule of compensation: 284

(a) For injury producing temporary disability, fifty per centum of the wages received at the time of injury, subject to a maximum compensation of ten dollars per week and a minimum of five dollars per week; *provided*, that if at the time of injury the employee receives wages of less than five dollars per week, then he shall receive the full amount of such wages per week. This compensation shall be paid during the period of such disability, not, however, beyond three hundred weeks.

(The following side-notes were printed with above paragraph): "Schedule of payments." "Temporary disability." "Proviso." 285

(b) For disability total in character and permanent in quality, fifty per centum of the wages received at the time of injury, subject to a maximum compensation of ten dollars per week and a mimimum of five dollars per week; *provided*, that if at the time of injury the employee receives wages of less than five dollars per week, then he shall receive the full amount of wages per week. This compensation shall be paid during the period of such disability, not, however, beyond four hundred weeks.

286 (The following side-notes were printed with above paragraph): "Complete disability." "Proviso."

(c) For disability partial in character but permanent in quality, the compensation shall be based upon the extent of such disability. In cases included by the following schedule the compensation shall be that named in the schedule, to wit:

(The following side-note was printed with above paragraph): "Partial disability."

For the loss of a thumb, fifty per centum of daily wages during sixty weeks.

287 (The following side-note was printed with above paragraph): "Thumb."

For the loss of a first finger, commonly called index finger, fifty per centum of daily wages during thirty-five weeks.

(The following side-note was printed with above paragraph): "First finger."

For the loss of a second finger, fifty per centum of daily wages during thirty weeks.

(The following side-note was printed with above paragraph): "Second finger."

For the loss of a third finger, fifty per centum
288 of daily wages during twenty weeks.

(The following side-note was printed with above paragraph): "Third finger."

For the loss of a fourth finger, commonly called little finger, fifty per centum of daily wages during fifteen weeks.

(The following side-note was printed with above paragraph): "Fourth finger."

The loss of the first phalange of the thumb, or of any finger, shall be considered to be equal to the

loss of one-half of such thumb, or finger, and compensation shall be one-half the amounts above specified. 289

The following side-note was printed with above paragraph): "Phalange."

The loss of more than one phalange shall be considered as the loss of the entire finger or thumb; *providing, however*, that in no case shall the amount received for more than one finger exceed the amount provided in this schedule for the loss of a hand.

(The following side-notes were printed with above paragraph): "More than one phalange." "Proviso."

290

For the loss of a great toe, fifty per centum of daily wages during thirty weeks.

(The following side-note was printed with above paragraph): "Great toe."

For the loss of one of the toes other than a great toe, fifty per centum of daily wages during ten weeks.

(The following side-note was printed with above paragraph): "Other toes."

For the loss of the first phalange of any toe shall be considered to be equal to the loss of one-half of such toe, and compensation shall be one-half of the amount above specified. 291

(The following side-note was printed with above paragraph): "Phalange of toe."

The loss of more than one phalange shall be considered as the loss of the entire toe.

(The following side-note was printed with above paragraph): "More than one phalange."

for the Loss of a hand, fifty per centum of daily wages during one hundred and fifty weeks.

292 (The following side-note was printed with above paragraph): "Hand."

For the loss of an arm, fifty per centum of daily wages during two hundred weeks.

(The following side-note was printed with above paragraph): "Arm."

For the loss of a foot, fifty per centum of daily wages during one hundred and twenty-five weeks.

(The following side-note was printed with above paragraph): "Foot."

For the loss of a leg, fifty per centum of daily
293 wages during one hundred and seventy-five weeks.

(The following side-note was printed with above paragraph): "Leg."

For the loss of an eye, fifty per centum of daily wages during one hundred weeks.

(The following side-note was printed with above paragraph): "Eye."

The loss of both hands, or both arms, or both feet, or both legs, or both eyes, or of any two thereof, shall constitute total and permanent disability, to be compensated according to the provisions of clause (b).
294

(The following side-note was printed with above paragraph): "Both hands, etc."

In all other cases in this class, the compensation shall bear such relation to the amounts stated in the above schedule as the disabilities bear to those produced by the injuries named in the schedule. Should the employer and employee be unable to agree upon the amount of compensation to be paid in cases not covered by the schedule, the amount of compensa-

tion shall be settled according to the provisions of paragraph twenty hereof. 295

(The following side-note was printed with above paragraph): "In other cases."

The amounts specified in this clause are all subject to the same limitations as to maximum and minimum as are stated in clause (a).

(The following side-note was printed with above paragraph): "Maximum and minimum amount."

"12. In case of death compensation shall be computed but not distributed on the following basis:

(1) Actual dependents. 296

If orphan or orphans, a minimum of twenty-five per centum of wages of deceased, with ten per centum additional for each orphan in excess of two, with a maximum of sixty per centum.

If widow alone, twenty-five per centum of wages.

If widow and one child, forty per centum of wages.

If widow and two children, forty-five per centum of wages.

If widow and three children, fifty per centum of wages.

If Widow and four children, fifty-five per centum of wages. 297

If widow and five children or more, sixty per centum of wages.

If widow and father or mother, fifty per centum of wages.

If grandparents, grandchildren, or minor, or incapacitated brothers or sisters, twenty-five per centum of wages.

Compensation in case of death shall be computed on the basis of the foregoing schedule, but shall be distributed according to the laws of this State pro-

298 viding for the distribution of the personal property of an intestate decedent, unless decedent has in fact left a will."

(The following side-note was printed with above paragraph): "Distribution of compensation in case of death."

(2) No dependents.

Expenses of last sickness and burial, not exceeding two hundred dollars.

(The following side-note was printed with above paragraph): "Sickness and burial."

In computing compensation to orphans or other
299 children, only those under sixteen years of age shall be included, and only during the period in which they are under that age, at which time payment on account of such child shall cease.

(The following side-note was printed with above paragraph): "Orphans and minors."

The compensation in case of death shall be subject to a maximum compensation of ten dollars per week and a minimum of five dollars per week; *provided*, that if at the time of the injury the employee receives wages of less than five dollars per week, then the compensation shall be the full
300 amount of such wages per week. This compensation shall be paid during three hundred weeks.

(The following side-notes were printed with above paragraph): "Weekly compensation." "Proviso." "Duration."

Compensation under this schedule shall not apply to alien dependents not residents of the United States.

(The following side-note was printed with above paragraph): "Aliens excepted."

13. No compensation shall be allowed for the first two weeks after the injury received, except as provided by paragraph fourteen, nor in any case unless the employer has actual knowledge of the injury or is notified thereof within the period specified in paragraph fifteen. 301

(The following side-note was printed with above paragraph): "No compensation first two weeks."

14. During the first two weeks after the injury the employer shall furnish reasonable medical and hospital services and medicines, as and when needed, not to exceed one hundred dollars in value, unless the employee refuses to allow them to be furnished by the employer. 302

(The following side-note was printed with above paragraph): "Medical and hospital services supplied first two weeks."

15. Unless the employer shall have actual knowledge of the occurrence of the injury, or unless the employe, or some one on his behalf, or some of the dependents, or some one on their behalf, shall give notice thereof to the employer within fourteen days of the occurrence of the injury, then no compensation shall be due until such notice is given or knowledge obtained. If the notice is given, or the knowledge obtained within thirty days from the occurrence of the injury, no want, failure or inaccuracy of a notice shall be a bar to obtaining compensation, unless the employer shall show that he was prejudiced by such want, defect or inaccuracy, and then only to the extent of such prejudice. If the notice is given, or the knowledge obtained within ninety days, and if the employe, or other beneficiary, shall show that his failure to give prior notice was due to his mistake, inadvertence, ignorance of fact or law, or 303

304 inability, or to the fraud, misrepresentation or deceit of another person, or to any other reasonable cause or excuse, then compensation may be allowed, unless, and then to the extent only that the employer shall show that he was prejudiced by failure to receive such notice. Unless knowledge be obtained, or notice given, within ninety days after the occurrence of the injury, no compensation shall be allowed.

(The following side-note was printed with above paragraph): "As to notification of employer."

16. The notice referred to may be served per-
305 sonally upon the employer, or upon any agent of the employer upon whom a summons may be served in a civil action, or by sending it through the mails to the employer at the last known residence or business place thereof within the State, and shall be substantially in the following form: To (name of employer):

You are hereby notified that a personal injury was received by (name of employe injured), who was in your employ at (place) while engaged as (nature of employment), on or about the ( ) day of ( ), nineteen hundred and ( ) and that compensation will be
306 claimed therefor.

Signed,

( )

but no variation from this form shall be material if the notice is sufficient to advise the employer that a certain employe, by name, received an injury in the course of his employment on or about a specified time, at or near a certain place. Notice served at the office of, or on the person who was the employe's immediate superior, shall be a compliance with this act.

(The following side-notes were printed with above paragraph): "Service of notice." "Form of notice." "Sufficiency of notice." 307

17. After an injury, the employe, if so requested by his employer, must submit himself for examination at some reasonable time and place within the State, and as often as may be reasonably requested, to a physician or physicians authorized to practice under the laws of this State. If the employe requests, he shall be entitled to have a physician or physicians of his own selection present to participate in such examination. The refusal of the employe to submit to such examination shall deprive him of the right to compensation during the continuance of such refusal. When a right to compensation is thus suspended no compensation shall be payable in respect of the period of suspension. 308

(The following side-note was printed with above paragraph): "Examination of employe as to physical condition."

18. In case of a dispute over, or failure to agree upon a claim for compensation between employer and employe, or the dependents of the employe, either party may submit the claim, both as to questions of fact, the nature and effect of the injuries, and the amount of compensation therefor according to the schedule herein provided, to the judge of the court of common pleas of such county as would have jurisdiction in a civil case, or where there is more than one judge of said court, then to either or any of said judges of such court, which judge is hereby authorized to hear and determine such disputes in a summary manner, and his decision as to all questions of fact shall be conclusive and binding. 309

310 (The following side-note was printed with above paragraph): "In case of dispute question submitted to court."

19. In case of death, where no executor or administrator is qualified, the said judge shall, by order, direct payment to be made to such person as would be appointed administrator of the estate of such decedent upon like terms as to bond for the proper application of compensation payments as are required of administrators.

(The following side-note was printed with above paragraph): "Payment in case of death."

311 20. Procedure in case of dispute shall be as follows:

Either party may present a petition to said judge setting forth the names and residences of the parties and the facts relating to employment at the time of injury, the injury in its extent and character, the amount of wages received at the time of injury, the knowledge of the employer or notice of the occurrence of said injury, and such other facts as may be necessary and proper for the information of the said judge, and shall state the matter or matters in dispute and the contention of the petitioner with reference thereto. This
312 petition shall be verified by the oath or affirmation of the petitioner.

(The following side-notes were printed with above paragraph): "Procedure in dispute." "Petition to court."

Upon the presentation of such petition the same shall be filed with the clerk of the Court of Common Pleas, and the judge shall fix a time and place for the hearing thereof, not less than three weeks after the date of the filing of said

petition. A copy of said petition shall be 313
served as summons in a civil action and may be served within four days thereafter upon the adverse party. Within seven days after the service of such notice the adverse party shall file an answer to said petition, which shall admit or deny the substantial averments of the petition, and shall state the contention of the defendant with reference to the matters in dispute as disclosed by the petition. The answer shall be verified in like manner as required for a petition.

(The following side-notes were printed with above paragraph): "Notice of hearing." "Answer filed." 314

At the time fixed for hearing or any adjournment thereof the said judge shall hear such witnesses as may be presented by each party, and in a summary manner decide the merits of the controversy. This determination shall be filed in writing with the clerk of the Common Pleas Court, and judgment shall be entered thereon in the same manner as in causes tried in the Court of Common Pleas, and shall contain a statement of facts as determined by said judge. Subsequent proceedings thereon shall only be for the recovery of moneys thereby determined to be due, provided that nothing herein contained shall be construed as 315
limiting the jurisdiction of the Supreme Court to review questions of law by certiorari. Costs may be awarded by said judge in his discretion, and when so awarded the same costs shall be allowed, taxed and collected as are allowed, taxed and collected for like services in the Common Pleas Court.

(The following side-notes were printed with above paragraph): "Hear witnesses." "Deter-

316 mination." "Subsequent proceedings." "As to costs."

"21. The amounts payable periodically as compensation may be commuted to one or more lump sum payments by the judge of the court of common pleas having jurisdiction as set forth in the preceding paragraph, upon the application of either party, in his discretion, provided the same be in the interest of justice. Unless so approved, no compensation payments shall be commuted.

(The following side-note was printed with above paragraph): "Amount may be commuted."

317 An agreement or award of compensation may be modified at any time by a subsequent agreement, or at any time after one year from the time when the same became operative it may be reviewed upon the application of either party on the ground that the incapacity of the injured employe has subsequently increased or diminished. In such case the provisions of paragraph seventeen with reference to medical examination shall apply."

(The following side-note was printed with above paragraph): "Agreement or award may be modified."

318 22. The right of compensation granted by this act shall have the same preference against the assets of the employer as is now or may hereafter be allowed by law for a claim for unpaid wages for labor. Claims or payments due under this act shall not be assignable, and shall be exempt from all claims of creditors and from levy, execution or attachment.

(The following side-notes were printed with above paragraph): "Compensation a preferential lien." "Claims not assignable."

SECTION III. GENERAL PROVISIONS. 319

23. For the purpose of this act, willful negligence shall consist of (1) deliberate act or deliberate failure to act, or (2) such conduct as evidences reckless indifference to safety, or (3) intoxication, operating as the proximate cause of injury.

(The following side-note was printed with above paragraph): "What constitutes willful negligence."

Wherever in this act the singular is used the plural shall be included; where the masculine gender is used, the feminine and neuter shall be 320 included.

(The following side-note was printed with above paragraph): "Use of certain words."

Employer is declared to be synonymous with master and includes natural persons, partnerships and corporations; employee is synonymous with servant and includes all natural persons who perform services for another for financial consideration, exclusive of casual employments.

(The following side-note was printed with above paragraph): "Synonyms."

321

Amputation between the elbow and the wrist shall be considered as the equivalent of the loss of a hand, and amputation between the knee and the ankle shall be considered as the equivalent of the loss of a foot.

(The following side-note was printed with above paragraph): "As to amputations."

24. In case for any reason any paragraph or any provision of this act shall be questioned in any court and shall be held to be unconstitutional

322 or invalid, the same shall not be held to affect any other paragraph or provision of this act, except that sections I and II are hereby declared to be inseparable, and if either section be declared void or inoperative in an essential part, so that the whole of such section must fall, the other section shall fall with it and not stand alone. Section I of this act shall not apply in cases where section II becomes operative in accordance with the provisions thereof, but shall apply in all other cases, and in such cases shall be in extension of the common law.

(The following side-notes were printed with
323 above paragraph): "As to constitutionality of any provision." "Relation of sections of act."

25. Every right of action for negligence, or to recover damages for injuries resulting in death, existing before this act shall take effect, is continued, and nothing in this act contained shall be construed as affecting any such right of action, nor shall the failure to give the notice provided for in section II, paragraph fifteen of this act, be a bar to the maintenance of a suit upon any right or action existing before this act shall take effect.

324 (The following side-note was printed with above paragraph): "Rights of action in previous cases."

26. All acts or parts of acts inconsistent with the provisions of this act are hereby repealed.

(The following side-note was printed with above paragraph): "Repealer."

27. This act shall take effect on the fourth day of July next succeeding its passage and approval.

Approved April 4, 1911.

(The following side-note was printed with above paragraph): "Effective." 325

CHAPTER 368, LAWS OF 1911.

A Supplement to an act entitled "An act prescribing the liability of an employer to make compensation for injuries received by an employee in the course of employment, establishing an elective schedule of compensation, and regulating procedure for the determination of liability and compensation thereunder," approved April fourth, one thousand nine hundred and eleven.

BE IT ENACTED *by the Senate and General Assembly of the State of New Jersey:* 326

1. Every contract of hiring, verbal, written or implied from circumstances, now in operation or made or implied prior to the time limited for the act to which this act is a supplement to take effect, shall, after this act takes effect, be presumed to continue subject to the provisions of section two of the act to which this act is a supplement, unless either party shall, prior to accident, in writing, notify the other party to such contract that the provisions of section two of the act to which this act is a supplement are not intended to apply. 327

(The following side-note was printed with above paragraph): "Contracts in operation to continue."

2. This act shall take effect on the fourth day of July next succeeding its passage and approval.

(The following side-note was printed with above paragraph): "Effective."

Approved May 2, 1911.

328 CHAPTER 241, LAWS OF 1911.

An act creating the Employers' Liability Commission and prescribing its powers and duties, and requiring reports to be made by the employers of labor upon the operations of the employers' liability law for the information of said commission.

BE IT ENACTED *by the Senate and General Assembly of the State of New Jersey:*

1. The Governor is hereby authorized to appoint six citizens of this State as an Employers' Liability Commission, who shall hold
329 their offices for the term of two years and until their successors are appointed and qualified. They shall receive no compensation for their services, but their actual traveling expenses incurred upon the business of the commission shall be paid by the State Treasurer, upon warrants approved by the president of the said commission. The commission shall have power to choose one of their number as president and one of their number as secretary and shall have power to appoint a clerk. The expenses of the commission, the salary of the secretary and of the clerk, shall be paid from
330 appropriations made for that purpose in any annual or supplemental appropriation bill. It shall be the duty of the commission to observe in detail, so far as possible, the operations throughout the State of the recent act of the Legislature commonly known as "The Employers' Liability Act," entitled "An act prescribing the liabiltiy of an employer to make compensation for injuries received by an employee in the course of employment, establishing an elective schedule of compensation and regulating procedure for the determination of liability and compensation thereunder,"

approved April fourth, one thousand nine hundred and eleven. 331

(The following side-notes were printed with above paragraph): "Commission appointed by Governor." "No compensation; expenses." "Officers." "Duties."

2. From and after the fourth day of July next, when the said law becomes operative, every employer of labor within the State of New Jersey shall report to said commission, upon the occurrence of any injury to any of his employes the name and nationality of the employe so injured, the nature and extent of such injury, whether said injured 332 employe and the employer at the time of said injury were subject to the provisions of section one or section two of said act, and the amount of compensation when determined, together with such other facts relating to such injury as the commission may request. The information thus received shall be tabulated, from time to time, and the records thereof shall be the private records of the commission; they shall not be made public or open to inspection unless in the opinion of the commission the public interests shall require it, and they shall not be used as evidence against any employer in any suit or action at law brought by any employe 333 for the recovery of damages. The commission shall hold meetings, from time to time, as they may deem necessary, and shall present to each session of the Legislature a report showing the operations under the said act during the preceding year, together with any suggestions or recommendations which they may deem necessary or proper for the improvement of the said act, in order to accomplish with the greatest efficiency the purposes of the said act.

(The following side-notes were printed with above

334 paragraph): "Employers to report injuries giving details." "Information tabulated." "Meetings "Annual report."

3. This act shall take effect immediately.

Approved April 27, 1911.

Stipulation Settling Case.

It is hereby stipulated that the foregoing case and exceptions contains all the evidence given upon the trial of this action, and that the same may be settled and ordered filed and annexed to the judg-
335 ment roll herein without notice to either party.

Dated March 17, 1914.

JOSEPH A. SHAY,
Attorney for Plaintiff-Respondent.

F. W. THOMSON & W. S. JENNEY,
Attorneys for Defendant-Appellant.

Order Settling Case.

On the above stipulation the foregoing case and
336 exceptions on appeal, containing all the evidence given upon the trial of this action, is hereby settled and allowed, and ordered to be filed in the Kings County Clerk's office, and annexed to the judgment roll in this action.

Dated March 17, 1914.

WILLIAM J. KELLY,
Justice of the Supreme Court.

Stipulation Waiving Certification. 337

Pursuant to Section 3301 of the Code of Civil Procedure, it is hereby stipulated that the foregoing consists of true and correct copies of the notice of appeal, the judgment roll, order denying defendant's motion for a dismissal of the complaint and granting plaintiff's motion for a general verdict upon the coming in of the special verdict, order denying defendant's motion for a new trial and case and exceptions, as settled, and the whole thereof, and the opinion of the Trial Court, now on file in the office of the Clerk of Kings County, and certification thereof by the Clerk of said County, pursuant to Section 1353 of said Code, is hereby waived. 338

Dated March 17, 1914.

JOSEPH A. SHAY,
Attorney for Plaintiff-Respondent.

F. W. THOMSON & W. S. JENNEY,
Attorneys for Defendant-Appellant.

339

340 **Opinion of the Trial Court.**

SUPREME COURT,

KINGS COUNTY—TRIAL TERM,

January, 1914.

BRUCE SHANKS,
Plaintiff,

against

THE DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY,
341 Defendant.

Action to recover damages for negligence. Master and servant.

On the trial, the Court having submitted certain specific questions of fact to the jury, under Section 1187, Code of Civil Procedure, the jury returning a special verdict that plaintiff's injuries were due to negligence on the part of defendant, that the plaintiff was free from contributory negligence, and assessing the damages at the sum of forty thousand dollars, the plaintiff moved for the direction of a
342 general verdict in his favor for the amount named; while the defendant renews its motion to dismiss the complaint.

JOSEPH A. SHAY,
For Plaintiff.

F. W. THOMSON,
For Defendant.

KELLY, J.

I can perceive no reason for burdening the record with a long opinion in this case. The amount of the verdict is very substantial, but the plaintiff lost

both hands in the accident, and I do not understand 343
that it is seriously urged that the damages awarded are excessvie. There was very little disagreement between the learned counsel for the respective parties as to the facts or the law. That the defendant is engaged in interstate commerce is expressly admitted in the answer. That the action was brought under the Federal Employers' Liability Act of April 22nd, 1908, was also expressly admitted by the defendant. When the Trial Judge expressed some doubt whether the Federal Statute should not be pleaded, counsel for the defendant stated on the record that the defendant did not question the sufficiency of the pleadings to bring the case under 344
the Federal Act; and if there was any defect in the complaint, it was expressly waived. I find that defendant's counsel devotes a large part of his very able brief to a discussion of the question, whether, at the time of the accident, the plaintiff was engaged in interstate commerce. I am free to say that I did not understand at the trial that there was any question about it. Before charging the jury I offered to submit the question to the jury and the learned counsel for the defendant stated upon the record that the defendant did not wish to raise that issue with the plaintiff. At the close of the remarks of defendant's counsel, the Court inquired: 345

The Court: That leaves negligence, contributory negligence and the amount of damages, in the present status of the case?

Mr. Thomson: Yes, sir.

But, if there was any question about it, I think that the matter is settled conclusively in plaintiff's favor by the decisions of the Supreme Court of the United States in Mondou *v.* N. Y., N. H. & H. R. Co., 223 U. S. Sup. Ct., 1, and the other cases in the series there referred to, and again in Pedersen *v.* D., L. & W. R. Co., 229 U. S. Sup.

346 Ct., 146. In the last case, Judge Van Devanter, writing for the Court says:

> "The true test always is: Is the work in question a part of the interstate commerce in which the carrier is engaged?"

The plaintiff in the case at bar was engaged in a repair shop which was devoted particularly to work on locomotives running between Hoboken, N. J., and Scranton, Pa. There were but two shops devoted to this kind of work, one in New Jersey and the other in Pennsylvania. "Rush work" as it was designated. His claim on the trial was that he
347 was engaged exclusively, on that work, and defendant stated, as before suggested, that it raised no question about his evidence. The plaintiff's case is much stronger in this regard than the cases cited. This plaintiff was not working on tracks, sidings, bridges, or coal trestles, which might be used for various kinds of traffic, and in such cases it has been held that the employee comes within the protection of the act of Congress. He was working on the locomotive engines devoted exclusively to interstate traffic—"rush work." It seems to me that he was almost in the same category as the engineer and fireman, and I can add
348 nothing to the opinion in the Pedersen case.

If the defendant was engaged in interstate commerce which is admitted, and if the plaintiff was engaged in interstate commerce, which I think is admitted on the record, but if not, it is to my mind established beyond a question under the rules laid down by the Federal Supreme Court, then the New Jersey Compensation Act does not apply because it is superseded by the Federal Act and the expressed constitutional grant to Congress of the right to regulate interstate commerce.

I understand that the defendant desires to question the constitutionality of the acts of Congress regulating the liability of the employer for accident to the employee, but this is settled by the decisions of the Supreme Court referred to and it is not profitable to discuss the matter here. 349

The Federal Statute is certainly very drastic with reference to the liability of employers. It does away with the fellow servant rule, the matter of assumed risks and contributory negligence. I noticed at the outset that there appeared to be very little disagreement between the counsel as to the facts of the law. From the very nature of the case I don't see how much difference could exist. 350 Under the law of the State of New York I think that plaintiff made out a case for the jury as to negligence and contributory negligence, and I don't see how there can be any doubt about it under the Federal Act.

I must therefore deny the defendant's motion to dismiss the complaint, to which ruling defendant's exception is noted, and I grant the plaintiff's motion for the entry of a general verdict in his favor for the sum of forty thousand ($40,000) dollars.

Order Filing Record in the Appellate Division. 351

Pursuant to Section 1353 of the Code of Civil Procedure, it is ordered that the foregoing printed record be filed in the office of the Clerk of the Appellate Division of the Supreme Court, in the Second Judicial Department.

Dated March 17, 1914.

WILLIAM J. KELLY,
Justice of the Supreme Court.

119 *Order of Reversal on Appeal from Judgment.*

At a Term of the Appellate Division of the Supreme Court, Held in and for the Second Judicial Department at the Borough of Brooklyn, on the 31st Day of July, 1914.

Present—Hon. Almet F. Jenks, Presiding Justice.
" " Joseph A. Burr,
" " William J. Carr,
" " Luke D. Stapleton,
" " Harrington Putnam,
Justices.

BRUCE SHANKS, Respondent,
vs.
THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY, Appellant.

The above named The Delaware, Lackawanna & Western Railroad Company, the defendant, in this action having appealed to the Appellate Division of the Supreme Court from a judgment of the Supreme Court entered in the office of the Clerk of the County of Kings, on the 14th day of February, 1914, and from an order made by said Court denying a motion for a new trial, and also from an order entered on the 13th day of February, 1914, denying defendant's motion for a dismissal of plaintiff's complaint, and the said appeal having been argued by Mr. Frederick W. Thomson
120 of counsel for the appellant and by Mr. Joseph A. Shay of counsel for the respondent, and due deliberation having been had thereon, and final judgment directed dismissing plaintiff's complaint, with costs, but without prejudice to plaintiff's remedy under the Workmen's Compensation Act of the State of New Jersey.

Opinion by Putnam, J., Jenks, P. J., Carr and Stapleton JJ., concur. Burr, J., reads for affirmance.

It is hereby ordered and adjudged that the judgment and order so appealed from be and the same are hereby reversed.

Enter.

ALMET F. JENKS, *P. J.*

Supreme Court, Appellate Division, Second Judicial Department.

Clerk's Office, Borough of Brooklyn, N. Y.

I, John B. Byrne, Clerk of the Appellate Division of the Supreme Court in the Second Judicial Department, do hereby certify that the foregoing is a copy of the order made by said Court upon the appeal in the above entitled action, and entered in my office on the 31st day of July, 1914, and that the original case upon which said appeal was heard are hereto annexed.

In witness whereof, I have hereunto set my hand and affixed the seal of said Court, at the Borough of Brooklyn, this 31st day of July, 1914.

[SEAL.] JOHN B. BYRNE, *Clerk.*

121 *Judgment.*

Supreme Court, Kings County.

BRUCE SHANKS, Plaintiff,
against
THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY,
Defendant.

The defendant in this action having appealed to the Appellate Division of the Supreme Court for the Second Judicial Department, from a judgment of the Supreme Court, entered in the office of the Clerk of Kings County, on the 14th day of February, 1914, in favor of the plaintiff and against the defendant, The Delaware, Lackawanna and Western Railroad Company, for the sum of Forty Thousand Dollars ($40,000.00) damages and One Hundred and Nineteen Dollars and Ninety-five Cents ($119.95) costs and disbursements, amounting in the aggregate to the sum of Forty Thousand One Hundred Nineteen Dollars and Ninety-five Cents ($40,119.95), and from an order made by said Court at the Trial Term of the Supreme Court, held in and for the County of Kings, at the County Court House in the Borough of Brooklyn, City of New York, on the 13th day of February, 1914, and entered in the Clerk's office of said County on the 13th day of February, 1914, which said order denied said
122 defendant's motion for a dismissal of plaintiff's complaint, and which said order granted plaintiff's motion for a general verdict in his favor, and from each and every part of said order, and also from an order made by said Court denying a motion for a new trial, and said Appellate Division having by an order duly entered in the office of the Clerk of said Appellate Division on the 13th day of July, 1914, directed final judgment, dismissing plaintiff's complaint, with costs, but without prejudice to plaintiff's recovery under the Workmen's Compensation Act of the State of New Jersey; and the costs of the defendant having been duly taxed upon notice in the sum of Three Hundred and Fifteen Dollars ($315.00);

Now, upon motion of F. W. Thomson, one of the attorneys for the defendant, it is

Ordered and adjudged that the said judgment so appealed from be, and the same is, hereby reversed, with costs to the defendant, and that the order, also appealed from and which denied defendant's motion to dismiss the plaintiff's complaint as hereinbefore described, be, and the same is, hereby reversed; and it is

Further ordered and adjudged that the defendant, The Delaware, Lackawanna and Western Railroad Company, do recover of the plaintiff, Bruce Shanks, the sum of Three Hundred and Fifteen Dol-

lars ($315.00) as its costs and disbursements, and that it have execution therefor.

Judgment entered this 25th day of September, one thousand nine hundred and fourteen.

CHAS. S. DEVOY, *Clerk.*

123 *Notice of Appeal.*

Court of Appeals, State of New York.

BRUCE SHANKS, Plaintiff-Appellant,
against
THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY,
Defendant-Respondent.

SIRS: Please take notice that the plaintiff in the above entitled action hereby appeals to the Court of Appeals of the State of New York, from an order of the Appellate Division, Second Department, entered and filed in the office of the Clerk of the Appellate Division, second Department, on the 31st day of July, 1914, and from the said order of reversal filed in the office of the Clerk of the County of Kings on the 24th day of August, 1914, reversing the judgment of Forty Thousand, One Hundred Nineteen and 95/100 ($40,119.95) Dollars, damages and costs in favor of the plaintiff and against the defendant, filed on the 14th day of February, 1914, in the office of the Clerk of the County of Kings, and directing final judgment dismissing plaintiff's complaint with costs, and from a judgment of
124 costs in the sum of Three Hundred and Fifteen ($315.00) Dollars, entered in the office of the Clerk of the County of Kings, on the 25th day of September, 1914, in favor of the defendant and against the plaintiff, and the plaintiff appeals from each and every part of said order and said judgment.

Dated, New York, September 28th, 1914.

Yours, &c.,

JOSEPH A. SHAY,
Attorney for Plaintiff-Appellant, 50 Broad Street, Borough of Manhattan, New York City.

To F. W. Thomson, W. S. Jenney, Attorneys for Defendant-Respondent, 90 West Street, Borough of Manhattan, New York City; Charles S. Devoy, Esq., County Clerk, Kings County, Brooklyn, N. Y.

125 *Opinion.*

PUTNAM, *J.:*

Defendant has been held liable under the Federal Employers' Liability Act of April 22, 1908 (35 U. S. Stat. at Large, 65, chap. 149, as amd. by 36 id., 291, chap. 143), for an injury to plaintiff at Kingsland, N. J., on January 14, 1912, and after the Workmen's

Compensation Law of New Jersey was in force. (See Laws of 1911, chap. 95, as amd. by Laws of 1911, chap. 368.)* Plaintiff was a machinist in the defendant's railroad repair shops. He was doing overtime work on Sunday, to remove a shaft-hanger bolted to a steel girder or truss, to be reset on same girder about two feet from its original position. This truss was one of a pair of longitudinal girders, a little over fifty feet apart, upon which were the tracks which carried an overhead traveling crane. The shaft-hanger conveyed power to a shaping machine on which brasses, keys and cotters were finished for engine connecting rods. Apparently this machine was being removed as a matter of shop arrangement, perhaps to make room for other tools near it. This was being done on Sunday, doubtless so as not to interrupt the full week day activities. After removing the bolts and detaching the shaft-hanger, plaintiff was about to drill new holes. He tried to reach over and down on the other side of the girder to the points where these holes came out. While he was thus reaching over the track of the crane, its wheels ran over his hands, causing the injuries for which this action is brought.

Plaintiff had previously worked repairing parts of locomotives,
but at this time, and on the day before, he had been assigned
126 to the wheelwright work of attending to the shop machines,
and of keeping them in repair. These shops at Kingsland were defendant's general repair shops in New Jersey. Often entire locomotives came there; sometimes only parts were sent there to be repaired and returned to the roundhouses. Repairs at these shops were on any locomotives indiscriminately, regardless of whether they ran in interstate or intrastate traffic.

The remedy by the Federal statute is "to any person suffering injury while he is employed by such carrier in such commerce" (35 U. S. Stat. at Large, 65, §1). These strict limitations are so as not to trench on the rights of the States. Congress can legislate concerning the mutual rights and liabilities of master and servant, when both are actually engaged in interstate commerce (Employers' Liability Cases, 207 U. S., 463).

The employee must be himself engaged in commerce, or his work must be a part of interstate commerce under Federal protection, but this is not his general line of work, but "the particular service in which the employee is engaged." The test declared by the Supreme Court of the United States is the "nature of the work being done at the time of the injury," not what the employee expects to do after the completion of his task (Illinois Cent. R. R. vs. Behrens, 233 U. S., 473, 478).

This plaintiff's recovery would require us to hold that the general repair shop of a railroad system, which has extensive local train service as well as through traffic—that the shop itself is an instrumentality of interstate commerce in the sense that a switch, or a bridge, has been so judicially declared. How carefully the Courts discriminate is seen as to the crew of a switch engine, which sometimes moves
local cars, and again cars carrying freight for points beyond
127 the State, the men working indiscriminately on both kinds
of traffic. But these employees are not thereby held to be

engaged in interstate commerce; on the contrary, such switching train work, though in constant change, is to be distinguished according to its character at the time of the employee's injury, and the liabilities by the Federal act are applied only to the handling and movement of cars that are then bound to or from across State lines (Illinois Cent. R. R. vs. Behrens, supra).

A test to decide if an injury to a railroad employee is within the protection of the act is its effect on the course and current of interstate commerce. Was the employee's relation to traffic so close and direct that his injury tended to stop or delay the movement of a train engaged in interstate commerce? (Lamphere vs. Oregon R. & Nav. Co., 196 Fed Rep., 336.) It is on this principle that not only the train crew, but an employee repairing its track or switch, is under the protection of the act. And as a bridge, if not kept in suitable condition, may by its defects interrupt commerce, the duty to repair such an instrumentality carries with it the protection of employees so engaged (Pedersen vs. Del. Lack. & West. R. R., 229 U. S., 146). And one working to repair a refrigerator car (Northern Pac. Ry. Co. vs. Maerkl, 198 Fed. Rep., 1), or at a shop, repairing a locomotive that has been in interstate commerce, is held within the statute (Law vs. Illinois Cent. R. Co., 208 Fed. Rep., 869). But the work of millwrights installing machine tools in a general repair shop is not interstate commerce, even if such tools are capable of use in repair of engines or cars. Many incidents of railroading cannot in any real or substantial sense be interstate commerce. For greater facility to expedite repairs a carrier may
128 operate its own foundry and forges with warehouses to store axles and carwheels. But the labor in setting up and maintaining such a plant is not thereby made commerce. If a car comes to such a shop those who work on the car may be engaged upon an instrumentality of transportation. The shop machines, however, like the supplies within the paint shop, have not reached the connection with the movement of trains required to bring those so engaged under this act. To hold otherwise would extend the purview of the statute beyond its construction by the Federal Courts.

I advise that the judgment and orders be reversed, with a final judgment dismissing the complaint, with costs, but without prejudice to plaintiff's remedy under the Workmen's Compensation Act of the State of New Jersey.

Jenks, P. J., Carr and Stapleton, JJ., concurred; Burr, J., read for affirmance.

Burr, *J.* (dissenting):

I dissent. The only question is whether plaintiff at the time of his injury was engaged in interstate commerce. The test, so far as plaintiff's occupation is concerned, has been stated thus: "Was that work being done independently of the interstate commerce in which the defendant was engaged, or was it so closely connected therewith as to be a part of it? Was its performance a matter of indifference so far as that commerce was concerned, or was it in the

nature of a duty resting upon the carrier?" (Pedersen vs. Del., Lack & West. R. R., 229 U. S., 146.)

Plaintiff was a machinist, employed by the defendant at its shops at Kingsland. He testified: "The work I was engaged in
129 was rush work. These engines would be pulled into Hoboken, and if anything would be wrong they would send the parts to Hoboken, and I would have to get those parts—they would be pulled into the roundhouse and the parts would be sent up to Kingsland to be repaired right away and sent back." He also testified with regard to "rush work" that it "would be generally on the ones (engines) going out of the State, the others they have got extra engines there to pull them out." He further testified that he "was the only man on this bench for this class of work." Among the machines upon which he worked was a shaping machine. "This machine is used for shaping keys and cotters and brasses for connecting rods." These keys and cotters were articles used to keep the piston rod in the cross-head of the locomotives.

The facts in immediate connection with the injury are stated in the prevailing opinion. It seems to me that, within the authorities, if plaintiff had been working upon the shaping machine and had been injured through a defect in it, he could be said to be engaged in interstate commerce (Pedersen vs. Del., Lack. & West. R. R., supra; St. Louis & San Francisco Ry. vs. Seale, 229 U. S., 156; Mondou vs. New York, New Haven & Hartford Railroad Co., 223 id., 1; Seaboard Air Line vs. Moore, 228 id., 433; North Carolina R. R. Co., vs. Zachary, 232 id., 248; Law vs. Illinois Cent. R. Co., 208 Fed. Rep., 869; Lamphere vs. Oregon R. & Nav. Co., 196 id., 336; Darr vs. Baltimore & O. R. Co., 197 id., 665; affd., 204 id., 751; Northern Pac. Ry. Co. vs. Maerkl, 198 id., 1; Thomson vs. Columbia & P. S. R. Co., 205 id., 203; Eng. vs. Southern Pac. Co., 210 id., 92).

The fact that this machine was sometimes employed in aid
130 of interstate commerce and sometimes in aid of intrastate commerce would make no difference provided that the act in which plaintiff was engaged was a part of interstate commerce (Illinois Cent. R. R. vs. Behrens, 233 U. S., 473).

In the Pedersen Case (supra) the plaintiff, acting under direction of his foreman, was carrying from a tool car to a bridge some bolts or rivets which were to be used in repairing the bridge, the repair consisting in taking out an existing girder and inserting a new one. This bridge was used both for interstate and intrastate commerce. It was held that plaintiff was engaged in interstate commerce.

In St. Louis & San Francisco Ry. vs. Seale (supra), which was a death case, deceased was employed by defendant as a yard clerk in its yard at North Sherman, and his principal duties were those of examining incoming and outgoing trains, making a record of the numbers and initials on the cars and making a record of the seals on car doors, checking the cars with the conductors' lists, and putting cards or labels on the cars to guide switching crews in breaking up incoming and making up outgoing trains. While so en-

gaged he was struck and fatally injured by a switch engine, which was being negligently operated by a fellow-employee. It was held that plaintiff was engaged in interstate commerce.

Seaboard Air Line vs. Moore (supra) was a case of a fireman of a switch engine which apparently never went out of defendant's yard at Tampa, who was injured by a defective footboard. It appeared that lumber on freight cars was shipped to the terminal of the Tampa Northern road at Tampa, and there unloaded and afterwards shipped by schooner to a point in New Jersey. It was held
131 that he was engaged in interstate commerce.

In North Carolina R. R. Co. vs. Zachary (supra), also a death case, the deceased was a fireman on engine No. 862, which ran entirely within the State of North Carolina from Selma to Spencer. He had prepared his engine for the trip and was crossing the tracks in the railroad yard when he was struck by engine No. 1551, a shifting engine used only in the yard, and was killed. It appeared that engine No. 862 was to haul two freight cars which had been brought in from Pinners Point, Va., and to carry them to Spencer, and that just before the accident he had been oiling his engine and preparing it for the trip. Although the cars had not yet been attached to the train, it was held that his employment in interstate commerce was not "in futura," but that the acts of inspecting, oiling and preparing his engine to haul these cars were acts performed as a part of interstate commerce. It was also claimed at the time of his death that he was injured while crossing the yard to go to his boarding house. The Court said he had not gone beyond the limits of the yard, and that there was nothing to indicate that his visit to the boarding house was out of the ordinary, or inconsistent with his duty to his employer, and the Court held that it was a question for the jury whether deceased while so doing was engaged in interstate commerce.

In Law vs. Illinois Cent. R. Co. (supra), a boilermaker's helper was engaged in assisting in the repair of an engine regularly used in interstate commerce, but which had been in the repair shop for twenty-one days. It was held that plaintiff was engaged in interstate commerce.

In Lamphere vs. Oregon R. & Nav. Co. (supra), an engineer was going to relieve another engineer who had been constantly on duty on an interstate train for a period of sixteen hours. Although
132 he had not yet reached the place of his employment, it was held that he was engaged in interstate commerce.

In Darr vs. Baltimore & O. R. Co. (197 Fed. Rep., 665) an interstate train has reached the end of its run. Plaintiff, who was employed in making running repairs, was sent to replace a bolt which had been lost from a brake shoe of the tender, and while so employed was injured through the negligence of a fellow-servant. It was held that he was engaged in interstate commerce, and this judgment was affirmed (204 Fed. Rep., 751).

In Northern Pac. Ry. Co. vs. Maerkl (supra), plaintiff was employed in repair shops connected with an interstate track. He was injured while repairing a car used indiscriminately in interstate and

intrastate commerce. It was held, for the purposes of the act, that he was engaged in interstate commerce.

In Eng. vs. Southern Pac. Co. (supra) it appeared that defendant was engaged both in interstate and intrastate commerce. Plaintiff was injured while framing a new office in a freight shed, and in sawing boards and nailing them to the wall. It was held that he was engaged in interstate commerce, and the Court said: "The principle seems to be that one employed at the time of his injury in the use of or maintaining in proper condition any instrumentality or appliance used by the carrier in interstate commerce comes within the statute, although such instrumentality or appliance may also be used for intrastate business," and it was held that a freight shed was used in interstate commerce.

Again, even if plaintiff in this case had not been operating the machine, but if he had been engaged in repairing it so that
133 it could be used, I think the same principle would apply. On the contrary, if he had been engaged in the construction of a new machine which had not yet been employed in interstate commerce, probably he would not have been. As was said by the Court in Law vs. Illinois Cent. R. Co. (supra): "We have not here a case of original construction on an engine not yet become an instrumentality of interstate commerce. It had already been impressed with such use and with such character. Its preservation as such was not a matter of indifference to defendant, so far as its interstate commerce was concerned." In the case at bar, the machine by previous use had become an instrumentality of interstate commerce. The mere change of its position was really of the character of a repair to it, or at least of an alteration in it to make it a more effective instrumentality.

In the Lamphere Case (supra) the Court, speaking of the injury to plaintiff, said: "What is its effect upon interstate commerce? Does it have the effect to hinder, delay, or interfere with such commerce? As applied to the present case, it is this: Was the relation of the employment of the deceased to interstate commerce such that the personal injury to him tended to delay or hinder the movement of a train engaged in interstate commerce?" I have an impression that the last question does not entirely fairly state the test, because in the case of Illinois Cent. R. R. vs. Behrens (233 U. S., 473) it was said that the application of the act should be confined to cases where "the particular service in which the employee is engaged is a part of interstate commerce," and that is, perhaps, a more accurate test. But even this, it seems to me, here is fulfilled. As I have tried to point out, plaintiff was engaged in improving the condition
134 of a machine engaged in interstate commerce. The effect of such improvement would be to facilitate the transaction of such commerce. Omitting to make such improvement would hinder, delay and interfere with it. I think, therefore, that plaintiff was thus engaged. I am quite confident that the framers of the United States Constitution when preparing the interstate commerce clause thereof (Art. 1, § 8, subd. 3), had not the remotest idea that this clause of the instrument was to be given the liberal construction that

has been given to it. Such construction is very much like judicial legislation. Perhaps this would indicate to conservative thinkers that circumstances have arisen which necessitate a change in the language of that venerable instrument, and perhaps to progressive thinkers it might seem that the change could readily and properly be made by the Courts without resorting to the slower method of constitutional amendment. If such construction does involve a change in that instrument we may only say that the highest Court in the land has directed it to be made and judicial subordination requires that we should follow.

135 *Stipulation Waiving Certification.*

Certification of the within printed appeal book, as required by Section 1315 of the Code of Civil Procedure and Rule I of the Court of Appeals, is hereby waived, and it is hereby consented that the appeal may be argued upon the uncertified printed papers, of which the within is a copy, and it is hereby stipulated that the within papers are true copies of the case and exception, as settled in this action and filed in the office of the Clerk of the County of Kings, the summons and complaint, answer, order denying motion for a new trial, judgment, notice of appeal before the Appellate Division, order and judgment of the Appellate Division entered thereon, and the notice of appeal to the Court of Appeals.

Dated, New York, October 21st, 1914.

JOSEPH A. SHAY,
Attorney for Appellant.
F. W. THOMSON,
W. S. JENNEY,
Attorneys for Respondent.

STATE OF NEW YORK,
County of Kings, ss:

I, Charles S. Devoy, Clerk of the County of Kings and Clerk of the Supreme Court of the State of New York in and for said County (said Court being a Court of Record,) Do hereby certify that I have compared the annexed with the original foregoing record on file in my office and that the same is a true transcript thereof, and of the whole of such original.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said County and Court, this 19 day of May, 1915.

[Seal Kings County.]

CHAS. S. DEVOY, *Clerk.*

15860.

136 COURT OF APPEALS,
State of New York, ss:

Pleas in the Court of Appeals, held at the Capitol, in the City of Albany, on the 26th day of March, in the year of Our Lord one thousand nine hundred and fifteen, before the judges of said court.

Witness, the Hon. Willard Bartlett, Chief Judge, presiding.
R. M. BARBER, *Clerk.*

Remittitur March 27, 1915.

BRUCE SHANKS, Appellant,
ag'st
THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD CO.,
Respondent.

Be it remembered that on the 2nd day of November in the year of our Lord one thousand nine hundred and fourteen, Bruce Shanks the appellant in this action, came here into the Court of Appeals, by Joseph A. Shay, his attorney, and filed in the said Court a Notice of Appeal and return thereto from the order and Judgment of the Appellate Division of the Supreme Court in and for the Second Judicial Department.

And The Delaware, Lackawanna and Western Railroad Co. the respondent in said action, afterwards appeared in said Court of Appeals by F. W. Thomson and W. S. Jenney its attorneys

Which said Notice of Appeal and the return thereto filed as aforesaid, are hereunto annexed.

137 Whereupon, the said Court of Appeals having heard this cause argued by Mr. Joseph A. Shay of counsel for the appellant, and by Mr. Frederick W. Thomson of counsel for the respondent, and after due deliberation had thereon, did order and adjudge that the judgment of the Appellate Division of the Supreme Court appealed from in this action, be in all things affirmed. And it was further ordered and adjudged that the respondent recover against the appellant costs of appeal to this Court.

And it was also further ordered, that the record aforesaid, and the proceedings in this Court be remitted to the said Supreme Court, there to be proceeded upon according to law.

Therefore, it is considered that the said judgment be in all things affirmed with costs as aforesaid, and stand in full force, strength and effect.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by them given in the premises, are by the said Court of Appeals, remitted into the Supreme Court of the State of New York, before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and

which record now remains in the said Supreme Court before the Justices thereof, &c.

R. M. BARBER,
Clerk of the Court of Appeals
of the State of New York.

COURT OF APPEALS, CLERK'S OFFICE,
ALBANY, Mar. 27, 1915.

I hereby certify that the preceding record contains a cor-
138 rect transcript of the proceedings in said action in the Court of Appeals, with the papers originally filed therein, attached thereto.

[SEAL.] R. M. BARBER, *Clerk.*

139 Supreme Court, Kings County.

BRUCE SHANKS, Plaintiff,
against
THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY,
Defendant.

SIR: You will please take notice that the remittitur in the above action has been filed in the office of the Clerk of this Court, and that on the 8th day of April, 1915, the undersigned will present the annexed proposed order to this Court at a Special Term, Part I, to be held at the Kings County Court House in the Borough of Brooklyn, City of New York, on the 8th day of April, 1915, at 10:00 o'clock in the forenoon, or as soon thereafter as counsel can be heard, for settlement.

Dated, April 2nd, 1915.

F. W. THOMSON,
W. S. JENNEY,
Attorneys for Defendant.

No. 90 West St., Borough of Manhattan, New York City.

To Joseph A. Shay, Attorney for Plaintiff, No. 50 Broad Street, Borough of Manhattan, New York City.

140 At a Special Term of the Supreme Court of the State of New York, held in and for the County of Kings, at the County Court House, Borough of Brooklyn, New York City, on the 8 Day of April, 1915.

Present: Hon. Abel E. Blackmar, Justice Presiding.

BRUCE SHANKS, Plaintiff,
vs.
THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY,
Defendant.

The above named plaintiff having appealed to the Court of Appeals of the State of New York from an order of the Appellate

Division of the Supreme Court, Second Department, filed and entered in the office of the Clerk of the Appellate Division, Second Department, on the 31st day of July, 1914, and from the said order of reversal filed in the office of the Clerk of the County of Kings on the 24th day of August, 1914, reversing the judgment of $40,119.95, damages and costs, in favor of the plaintiff and against the defendant, filed in said Kings County Clerk's office on the 14th day of February, 1914, and directing final judgment dismissing the plaintiff's complaint with costs, and from a judgment for costs in the sum of $315.00 filed and entered in the office of the Clerk of the County of Kings on the 25th day of September, 1914, in favor of the defendant and against the plaintiff, and the said appeal having been duly argued at the Court of Appeals, and
141 after due deliberation the Court of Appeals having ordered and adjudged that the said order and judgment of the Appellate Division so appealed from as aforesaid, be affirmed with costs, and having further ordered and adjudged that the proceedings therein be remitted to the Supreme Court, there to be proceeded upon according to law;

Now, on reading and filing the remittitur from the Court of Appeals herein and notice of application for this order with proof and due service thereof on the attorney for the plaintiff, and upon motion of F. W. Thomson and W. S. Jenney, Attorneys for the Defendant, it is

Ordered, that the said order and judgment of the Court of Appeals be and the same hereby are made the order and judgment of this Court.

Enter.

A. E. B., *J. S. C.*

Granted April 8, 1915.
CHARLES S. DEVOY, *Clerk.*

STATE OF NEW YORK,
County of Kings, ss:

I, Charles S. Devoy, Clerk of the County of Kings and Clerk of the Supreme Court of the State of New York in and for said County (said Court being a Court of Record,) do hereby certify that I have compared the annexed with the original order filed in my office April 9, 1915, and that the same is a true transcript thereof, and of the whole of such original.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said County and Court this 19 day of May, 1915.

[SEAL KINGS COUNTY.] CHAS. S. DEVOY, *Clerk.*

[Endorsed:] Supreme Court, Kings County. Bruce Shanks, Plaintiff, vs. The Delaware, Lackawanna and Western Railroad Company, Defendant. Order on Remittitur with Notice of Entry. (Copy.) F. W. Thomson, W. S. Jenney, Attorneys for Defendant, Office and Post Office Address, 90 West Street, Borough of Manhattan, New York City. Rec'd Apr. 9, '15. W. J., Att'y. To Joseph A. Shay, Esq., Attorney for Plaintiff.

SIR: Please take notice, that the within is a true copy of an order this day duly made and entered in the within entitled action, and filed in the office of the Clerk of this Court.

Dated, New York, April 9, 1915.

Yours, &c.,

F. W. THOMSON,
W. S. JENNEY,
Attorney- for D'f't.

Office and Post Office Address, 90 West Street, Borough of Manhattan, City of New York.

To Joseph A. Shay, Esq., Attorney for Pl'ff.

142 Supreme Court, Kings County.

BRUCE SHANKS, Plaintiff,
against
THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY,
Defendant.

A judgment in this action in favor of the plaintiff and against the defendant having been rendered in this Court on the 14th day of February, 1914, which was filed and entered in the office of the Clerk of this Court on said day, for the sum of $40,119.95, damages and costs, and the defendant having appealed to the Appellate Division of this Court for the Second Department from the said judgment and from the order denying defendant's motion for a new trial, and also from the order denying defendant's motion for a dismissal of the complaint, both entered in said Clerk's office on the 13th day of February, 1914, and the said judgment and orders having been reversed by this Court at the said Appellate Division on the 31st day of July, 1914, and a judgment of reversal having been entered in the office of the Clerk of this Court on the 25th day of September, 1914, and that the defendant recover of the plaintiff $315.00, its costs of said appeal, and the plaintiff having appealed from the said judgment of reversal to the Court of Appeals and the said Court of Appeals having sent hither its remittitur, filed herein the 2d day of April, 1915, by which it appears that the said Court of Appeals has affirmed the said judgment of the Appellate Division in all
143 things with costs, and has given judgment accordingly and has remitted the judgment of the Court of Appeals to this Court to be enforced according to law, and this Court having by an Order duly entered the 9th day of April 1915 ordered that the said judgment of the Court of Appeals be made the judgment of this Court, and the defendant's costs having been duly taxed by the Clerk of this Court at the sum of $106.97, it is on motion of F. W. Thomson and W. S. Jenney, Attorneys for the defendant,

Adjudged, that the said Order and Judgment of the Court of Appeals affirming the Order and Judgment of the Appellate Division for the Second Department, be, and the same hereby are, made the Order and Judgment of this Court; and it is further

Adjudged, that the above named defendant The Delaware, Lackawanna and Western Railroad Company, recover of the plaintiff, Bruce Shanks, the sum of $106.97 the amount of the defendant's costs as taxed, and that the defendant have execution therefor.

Judgment signed and entered this 9 day of April, 1915.

CHAS. S. DEVOY, *Clerk.*

STATE OF NEW YORK,
County of Kings, ss:

I Charles S. Devoy, Clerk of the County of Kings and Clerk of the Supreme Court of the State of New York in and for said County, (said Court being a Court of Record,) do hereby certify that I have compared the annexed with the original judgment filed in my office April 9, 1915, and that the same is a true transcript thereof, and of the whole of such original.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said County and Court, this 19 day of May, 1915.

[Seal Kings County.]

CHAS S. DEVOY, *Clerk.*

144 SIR: Please take notice, that the within is a true copy of judgment this day duly made and entered in the within entitled action, and filed in the office of the Clerk of this Court.

Dated, New York, April 9, 1915.

Yours, &c.,

F. W. THOMSON,
W. S. JENNEY,
Attorney- for D'f't.

Office and Post Office Address, 90 West Street, Borough of Manhattan, City of New York.

To Joseph A. Shay, Esq., Attorney for Plaintiff.

[Endorsed:] Supreme Court, Kings County. Bruce Shanks, Plaintiff, vs. The Delaware, Lackawanna and Western Railroad Company, Defendant. Copy. Judgment with Notice of Entry. F. W. Thomson, W. S. Jenney, Attorneys for Defendant. Office and post office address, 90 West Street, Borough of Manhattan, New York City. Rec'd Apr. 9, '15. W. J., Att'y. To Joseph A. Shay, Esq., attorney for plaintiff, 50 Broad St., city.

145 STATE OF NEW YORK,
County of Kings, ss:

Clerk's Office of the Supreme Court of the State of New York for the County of Kings.

[United States internal revenue documentary stamp, series of 1914, ten cents, canceled May 20, 1915. K. Co. C., B'k'l'yn, N. Y.]

I, Charles S. Devoy, Clerk of the County of Kings, and of the Supreme Court of the State of New York for the said County of

Kings, by virtue of the annexed Writ of Error which was served upon me on the 20th day of May, 1915, and in obedience thereto, do hereby certify that the foregoing pages numbered from 1 to 143 inclusive, contain a true and complete transcript of the record and proceedings had in said Court in the suit of Bruce Shanks, Plaintiff in Error, vs. Delaware, Lackawanna & Western Railroad Company, Defendant in Error, mentioned in said writ of error, as the same remain of record and on file in my office, and that annexed hereto is the Petition and Assignment of Error, the citation to the defendant in error with admission of service of the same and said writ of error served upon me.

In witness whereof, I have caused the seal of the said Court to be hereunto affixed and have hereunto set my hand at my office in the City of New York, and County of Kings on the 20th day of May, 1915.

[Seal Kings County.]

CHAS. S. DEVOY, *Clerk.*

146 Court of Appeals of the State of New York.

BRUCE SHANKS, Plaintiff in Error,
against
DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY,
Defendant in Error.

To the Hon. Willard Bartlett, Chief Judge of the Court of Appeals of the State of New York:

The petition of Bruce Shanks respectfully shows:

I. That heretofore, to wit, upon the 7th and 8th days of January, 1914, there was tried in the Supreme Court of the State of New York, in and for the County of Kings, of the State of New York, a case in which Bruce Shanks was plaintiff and the Delaware, Lackawanna & Western Railroad Company was defendant.

II. The complaint of the plaintiff in said case was for the recovery of damages by reason of personal injuries sustained by the plaintiff, said damages being laid in the sum of One hundred thousand ($100,000) Dollars, and said personal injuries being alleged by plaintiff to have been the result of negligence on the part of the defendant and one of its employees, in that it caused and permitted an overhead traveling crane operated upon a track in the shops of defendant at Kingsland, New Jersey, to run into and collide with the body of the said Bruce Shanks, by reason of which he
147 sustained painful and permanent injuries, especially to both hands which were amputated at about the wrist, and which negligence comes within the purview and meaning of the Federal Employers' Liability Act, being 35 Statutes at Large, 65, Chapter 149, which became a law on April 22nd, 1908.

III. Upon the trial of said case, the said defendant claimed and asserted and denied its liability upon the following grounds:

(1) That the plaintiff in error was not entitled to recover because he was not, at the time of the happening of said accident engaged in interstate commerce within the meaning of said Act.

(2) That he was not injured through the negligence of the defendant or any of its employees.

(3) That he contributed to his own injury.

That thereupon a verdict for the plaintiff in error was rendered for the sum of Forty Thousand ($40,000) Dollars, and thereupon the defendant in error moved to set aside said verdict upon the grounds hereinbefore stated, and said motions were in all respects denied, and thereupon judgment was entered in favor of the plaintiff in error, upon said verdict.

That thereupon the defendant appealed to the Appellate Division of the Supreme Court, in and for the Second Department from said judgment, and said Appellate Division of the Supreme Court, in and for the Second Department, reversed said judgment in favor of the plaintiff in error, and dismissed the complaint upon the ground

148 that the plaintiff in error was not at the time of the happening of the accident aforesaid, engaged in interstate commerce within the meaning of the act hereinbefore referred to.

That one of the justices of said Court dissented from the judgment directed, as aforesaid, citing in support of his contention, that the plaintiff in error was engaged in interstate commerce at the time aforesaid, under the decision of the Supreme Court of the United States, in the case of Pedersen vs. Delaware, Lackawanna & Western Railroad Company, 229 U. S. 146, and other decisions of this Court.

That the plaintiff in error thereupon appealed to the Court of Appeals of the State of New York, from the judgment directed by the Appellate Division of the Supreme Court, in and for the Second Department, dismissing the complaint of the plaintiff in error, and said appeal coming on to be heard before said Court of Appeals, the said judgment of the Appellate Division was affirmed. Two of the Judges of said Court, namely, Judges Samuel Seabury and Benjamin N. Cardoza dissented from said judgment of affirmance, upon the ground that the plaintiff in error, at the time of the happening of the said injury, was engaged in interstate commerce, and they also cited, in support of their dissent, the decision of the Supreme Court of the United States of Pedersen vs. Delaware, Lackawanna & Western Railroad Company, hereinbefore referred to, and others.

That the judgment appealed from presents a Federal question in this case, namely, the construction of 35 Statutes at Large, 65, Chapter 149, which is known as the Federal Employers Liability Act, and

149 also the question whether the plaintiff in error, at the time of the happening of the accident was engaged in interstate commerce within the meaning and provisions of said act.

Wherefore, your petitioner prays for the allowance of a Writ of Error from the Supreme Court of the United States to the Court of Appeals of the State of New York, and the Judges thereof, to the end that the record in said matter may be removed into the Supreme Court of the United States and the error complained of by your

petitioner may be examined and corrected and so judgment reversed and your petitioner will ever pray.

BRUCE SHANKS,
By JOSEPH A. SHAY,
His Attorney.

STATE OF NEW YORK,
Southern District of New York, ss:

Joseph A. Shay being duly sworn deposes and says: That he is the attorney for the petitioner named in the foregoing petition; that he has read the foregoing petition and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

JOSEPH A. SHAY.

Sworn to before me this 26th day of April, 1915.

[Seal Wm. R. Stansbury, Notary Public, District of Co-]
lumbia.]

WM. R. STANSBURY,
Notary Public, District of Columbia.

150 Court of Appeals of the State of New York.

BRUCE SHANKS, Plaintiff in Error,
against
THE DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY,
Defendant in Error.

And now, before the Justices of the Supreme Court of the United States of America, at the Capitol, in the City of Washington comes Bruce Shanks, Plaintiff in Error, by his Counsel in the above stated case, and respectfully submits that in the record, proceedings, decision and final judgment of the Court of Appeals, there is manifest error, in this, to wit:

That the Court of Appeals of the said State of New York, erred in adjudging and deciding that the plaintiff in error was not engaged in interstate commerce, so as to come within the provisions of 35 Statutes at Large, 65, Chapter 149, known as the Federal Employers' Liability Act.

Plaintiff in error says that in the aforesaid suit was drawn in the following questions:

1. The construction of 35 Statutes at Large, 65, Chapter 149, which is known as the Federal Employers' Liability Act, and which became a law on April 22nd, 1908.

2. Whether the plaintiff in error, at the time of the happening of the accident was engaged in interstate commerce within the meaning and provisions of said act. To the said judgment and
151 decision of the Court of Appeals the plaintiff in error hereby excepts, and assigns the same as error.

Wherefore, the said Bruce Shanks prays that the judgment and decision aforesaid may be reversed, annulled and altogether held for naught and that he may be restored to all things which he has lost by the action and because of the said judgment and decision.

BRUCE SHANKS,
By JOSEPH A. SHAY,
Attorney and Counsel for Plaintiff in Error.

152 Let the writ issue as prayed April 26", 1915.

CHARLES E. HUGHES,
Associate Justice of the Supreme Court of the United States.

[Endorsed:] Court of Appeals of the State of New York. Bruce Shanks, Plaintiff in Error, against The Delaware, Lackawanna & Western Railroad Company, Defendant in Error. Original. Petition and Assignment of Error. Joseph A. Shay, Attorney for Plaintiff in Error, 50 Broad Street, Borough of Manhattan, New York City.

153 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of New York, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court, being possessed of the record and proceedings upon a remittitur from the Court of Appeals of the State of New York, before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Bruce Shanks, plaintiff, and Delaware, Lackawanna & Western Railroad Company, defendant, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein any title, right, privi-

154 lege, or immunity was claimed under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States, and the decision was against the title, right, privilege, or immunity especially set up or claimed under such Constitution, treaty, statute, commission, or authority; a manifest error hath happened to the great damage of the said plaintiff, Bruce Shanks, as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all

things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the twelfth day of May, in the year of our Lord one thousand nine hundred and fifteen.

JAMES D. MAHER,
Clerk of the Supreme Court of the United States.

Allowed by

CHARLES E. HUGHES,
Associate Justice of the Supreme Court of the United States.

155 [Endorsed:] Supreme Court of the United States, October Term, 1914. Bruce Shanks vs. Delaware, Lackawanna & Western Railroad Company. Writ of Error. Service of a copy of the within Writ of Error is hereby admitted May 17, 1915. F. W. Thomson, W. S. Jenney, Attorneys for D., L. & W. R. R. Co., Def't in Error.

156 UNITED STATES OF AMERICA, *ss:*

To Delaware, Lackawanna & Western Railroad Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the Supreme Court of the State of New York, wherein Bruce Shanks is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Charles E. Hughes, Associate Justice of the Supreme Court of the United States, this twelfth day of May, in the year of our Lord one thousand nine hundred and fifteen.

CHARLES E. HUGHES,
Associate Justice of the Supreme Court of the United States.

157 [Endorsed:] Service of a copy of the within Citation is hereby admitted this 17th day of May 1915. F. W. Thomson, W. S. Jenney, Attorneys for D., L. & W. R. R. Co., Def't in Error.

158 Know all men by these presents: That we, Bruce Shanks, as Principal and the Illinois Surety Company, a corporation organized and existing under the laws of the State of Illinois and having an office and place of business in the Borough of Manhattan, at 170 Broadway, in the City and State of New York, as surety, are held and firmly bound unto Delaware, Lackawanna & Western R. R. Co., in the full and just sum of five hundred ($500.00) dollars, to be paid to the said Delaware, Lackawanna & Western R. R. Co., its certain attorney, executors, administrators or assigns; to which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents.

Sealed with our seals and dated this 11th day of May, in the year of our Lord One thousand nine hundred and fifteen.

Whereas, lately at a Term of the Court of Appeals in a suit depending in said Court, between Bruce Shanks as Plaintiff-Appellant and Delaware, Lackawanna & Western R. R. Co. as Defendant-Respondent, a Judgment of affirmance was rendered against the said Bruce Shanks and an order directing that the Judgment entered with the remitt-ure be made the Judgment of the New York Supreme Court, Kings County and said Judgment having been so entered and the said Bruce Shanks having obtained a writ of error and filed a copy thereof in the Clerk's Office of the said Court to reverse the Judgment in the aforesaid suit, and a citation directed to the said Delaware, Lackawanna & Western R. R. Co., citing and admonishing it to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date thereof.

Now, the condition of the above obligation is such, That if the said Bruce Shanks shall prosecute his writ of error to effect, and answer all costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

BRUCE SHANKS.
ILLINOIS SURETY COMPANY,
[SEAL.] By J. ELIHU ROOT KUNZMANN,
Attorney-in-Fact.

Sealed and delivered in presence of
LILLIAN R. BERGER.

Approved
CHARLES E. HUGHES,
Associate Justice, Supreme Court U. S.

STATE OF NEW YORK,
County of Kings, ss:

I, Charles S. Devoy, Clerk of the County of Kings and Clerk of the Supreme Court of the State of New York in and for said County, (said Court being a Court of Record,) do hereby certify that I have compared the annexed with the original Bond filed in my office May 24, 1915 and that the same is a true transcript thereof, and of the whole of such original.

(O. K. T. S. 5-24-1915.)

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said County and Court, this 24 day of May 1915.

[KINGS COUNTY SEAL.] CHARLES S. DEVOY, *Clerk.*

159 CITY AND COUNTY OF NEW YORK,
State of New York, ss:

On the 11th day of May 1915 before me personally came J. Elihu Root Kunzmann to me known, who, being duly sworn, did depose and say that he resides in the City of New York; that he is an attorney-in-fact of the Illinois Surety Company, the corporation described in and which executed the within instrument; that he knew the seal of said corporation; that the seal attached to said instrument was such corporate seal; that it was so affixed by order of the Board of Directors of said Company, and that he signed his name thereto by like order; and that the liabilities of said Company do not exceed its assets, as ascertained in the manner provided by law.

Sworn to before me the day and year first above written.

[SEAL.] HARRY D. HASTINGS,
Commissioner of Deeds for the City of New York,
Residing in the Borough of Manhattan.

N. Y.	Co.	Clerk's	No.	1126.
"	"	Register's	"	17047.
Kings	"	Clerk's	"	207.
"	"	Register's	"	7039.
Bronx	"	Clerk's	"	1.
"	"	Register's	"	7018.
Queens	"	Clerk's	"	2386.

Certificate filed in Richmond Co.

Power of Attorney from Illinois Surety Company to O. Wilson Gott and J. Elihu Root Kunzmann or Either of Them.

Know All Men by these Presents: That the Illinois Surety Company, a corporation duly incorporated under the laws of the State of Illinois, and duly authorized to act as sole surety, in pursuance of the following resolution, which was passed by the Board of Directors of the Company at a meeting held March 25, A. D. 1907, to-wit:

"Resolved, that the President, Vice-President or an Acting-President is hereby authorized, empowered and directed to make and appoint such agents and to execute such Powers of Attorney to accept process for and on behalf of this Company, or to authorize the said attorneys and agents to execute Bonds, undertakings or writings obligatory in the nature thereof, for and on behalf of this Company, as shall be needful, and to the same extent and effect as though said appointments were severally made by separate action of the Board of Directors in each instance, and the Secretary or Assistant Secretary is hereby authorized, empowered and directed to authenticate such appointments, affixing the corporate seal of the Company to the same,"

has made, constituted and appointed, and by these presents doth make, constitute and appoint O. Wilson Gott and J. Elihu Root Kunzmann, of the City, County and State of New York, or either of them, its true and lawful attorneys-in-fact, with full power and authority to sign, seal, acknowledge and deliver in its name, place and stead, as surety, Bonds, undertakings, or writings obligatory in the nature thereof and when such Bonds, undertakings or writings obligatory are signed by the said O. Wilson Gott and J. Elihu Root Kunzmann, or either of them, as attorneys-in-fact, to bind the company as fully and to the eame extent as if said Bonds, undertakings or writings obligatory in the nature thereof, were executed by the Executive Officers of this Company at its Home Office in the City of Chicago, State of Illinois, and the Company hereby ratifies and confirms all that its said attorneys-in-fact may do or lawfully cause to be done in the premises by virtue of these presents.

In Witness Whereof, the Illinois Surety Company has caused these presents to be signed by its President, attested by its Secretary and its corporate seal to be hereunto affixed this first day of December, A. D. 1913.

[SEAL.] ILLINOIS SURETY COMPANY,
By A. J. HOPKINS, *President.*

Attest:
CHAS. E. SCHICK, *Secretary.*

I, H. C. Bilter, Assistant Secretary of the Illinois Surety Company, hereby certify that the above Power of Attorney is a true copy of the original records of said Company.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Company, this 16th day of March, A. D. 1915, at the City of Chicago, State of Illinois.

[SEAL.] H. C. BILTER,
Assistant Secretary.

Statement of Financial Condition of Illinois Surety Company at the Close of Business December 31*st,* 1914.

Assets.

Stocks and Bonds	$471,479.40
Cash in Office and Depositories	210,545.25
Premiums in hands of Agents and in Course of Collection	237,366.83
Accrued Interest	3,668.77
Bills Receivable	12,620.84
Advances on Contracts	26,507.06
Mortgage Loans	25,000.00
Miscellaneous Accounts Receivable	5,303.23
Due from N. Y. Excise Committee	31,949.98
Due from Branch Offices	1,656.00
	$1,026,097.36

Liabilities.

Capital Stock	$250,000.00
Surplus	236,804.10
Reserve for Re-Insurance	230,491.61
Reserve for Losses and Contingencies	212,123.64
Unpaid Commissions not due	47,417.10
Collateral Deposits	38,145.26
Due for Re-Insurance	6,451.33
Accrued Taxes	4,664.32
	$1,026,097.36

CITY AND COUNTY OF NEW YORK,
State of New York, ss:

I, J. Elihu Root Kunzmann Attorney-in-fact of the Illinois Surety Company, do hereby certify that the foregoing is a true and correct copy of the statement of assets and liabilities of the said Company at the close of business, December 31st, 1914.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Company, this 11th day of May 1915.

J. ELIHU ROOT KUNZMANN,
Attorney-in-Fact.

Subscribed and Sworn to before me this 11th day of May 1915.

[SEAL.] HARRY D. HASTINGS,
Commissioner of Deeds for the City of New York, Residing in the Borough of Manhattan.

N. Y. Co.	Clerk's	No.	1126.
" " "	Register's	"	17047.
Kings "	Clerk's	"	207.
" "	Register's	"	7039.
Bronx "	Clerk's	"	1.
" "	Register's	"	7018.
Queens "	Clerk's	"	2386.

Certificate filed in Richmond Co.

160 [Endorsed:] 1000/24,744. Supreme Court Kings County. Bruce Shanks, Plaintiff-Appellant, against Delaware, Lackawanna & Western R. R. Co., Defendant-Respondent. I approve of the within bond and the sufficiency of the surety herein. Copy. Illinois Surety Company. All Kinds of Surety Bonds. Illinois Surety Company, Home Office: Chicago, Ill. New York Office: 170 Broadway.

161 Supreme Court of the United States.

BRUCE SHANKS, Plaintiff in Error,
against
THE DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY,
Defendant in Error.

It is hereby stipulated and agreed by and between the attorneys for the respective parties hereto, that the opinions of the Court of Appeals, in the above case, reported in 214 N. Y., 413, be added to, printed in and made a part of the record of the above entitled action, now in this Court,

Dated, New York, June 8th, 1915.

JOS. A. SHAY,
Attorney for Plaintiff in Error.
M. S. JENNEY,
F. W. THOMSON,
Attorney- for Defendant in Error.

162 [Endorsed:] 1000/24744. Supreme Court of the United States. Bruce Shanks, Plaintiff in Error, against The Delaware, Lackawanna & Western Railroad Company, Defendant in Error. Original. Stipulation. Joseph A. Shay, Attorney for Plaintiff in Error, 50 Broad Street, Borough of Manhattan, New York City.

163 1000—24744.

BRUCE SHANKS, Appellant,
v.
THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY,
Respondent.

Railroads—master and servant—negligence—Federal Employers' Liability Act—when railroad company although engaged in interstate commerce not liable for injury to employee working in shop where locomotives used in interstate commerce are repaired.

This action is brought under the Federal Employers' Liability Act of April 22, 1908 (35 Stat. at L. 65, ch. 149; U. S. Comp. Stat. Supp. 1911, p. 1322), to recover damages for personal injuries sustained by the plaintiff while engaged as an employee of the defendant. Defendant is a railroad corporation and common carrier engaged in both intrastate and interstate commerce. Plaintiff was employed as a mechanic in a shop devoted particularly to the repair of locomotive engines, and his principal work was in running a shaping machine, where he shaped parts to be used in the repair of locomotives that were in immediate need of repair. His work was generally, but not exclusively, in the repair of locomotives used in interstate commerce. The power was applied to the shaping ma-

chine used by him from a countershaft and pulley attached by hangers to girders which were about eighteen feet above the floor of the shop. The defendant desired to move such countershaft to make room for another shaping machine, and to do so it was necessary to take the countershaft down and change the hangers on which it was suspended, and plaintiff was injured while so engaged. Held, that defendant was not engaged in repairing or moving the shaping machine, but his work had to do with the supply of
164 power to a machine that might thereafter be used in shaping parts for the repair of locomotives; that he cannot recover under the Federal statute since it does not appear that he was, within the meaning of that act, engaged in interstate commerce when injured. (Pedersen v. D., L. & W. R. R. Co., 229 U. S. 146, distinguished.)

Shanks v. Delaware, Lackawanna & Western R. R. Co., 163 App. Div. 565, affirmed.

(Argued January 22, 1915; decided March 26, 1915.)

Appeal from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered September 25, 1914, upon an order reversing a judgment in favor of plaintiff entered upon a verdict and directing a dismissal of the complaint.

The nature of the action and the facts, so far as material, are stated in the opinion.

Joseph A. Shay for appellant. Both the defendant and the plaintiff were unmistakably engaged in interstate commerce at the time of the injury. (Pedersen v. D., L. & W. R. R. Co., 229 U. S. 146; Lamphere v. O. R. & N. Co., 196 Fed. Rep. 336; Horton v. O., etc., Co., 130 Pac. Rep. 897; Johnson v. Southern Pacific Co., 196 U. S. 1; N. P. R. Co. v. Maerkl, 198 Fed. Rep. 1; C. R. Co. v. Colorado, 192 Fed. Rep. 901.)

Frederick W. Thomson for respondent. When the plaintiff's injuries were suffered the defendant was not engaged in interstate commerce, and the plaintiff was not employed by the defendant in such commerce. (I. C. R. R. Co. v. Behrens, 293 U. S. 473.)

CHASE, *J.*:

This action is brought under the Federal Employers' Liability Act of April 22, 1908 (35 Stat. at L. 65, ch. 149; U. S. Comp. Stat. Supp. 1911, p. 1322), to recover damages for personal injuries sustained by the plaintiff while engaged as an employee of the defendant in a shop near Hoboken, N. J.

165 The defendant is a railroad corporation and common carrier and at the times hereinafter mentioned was engaged in interstate commerce. It was also engaged in intrastate commerce. Its road extends from Hoboken, N. J., to Buffalo, N. Y., and passes through and is in part located in the state of Pennsylvania. The Federal Employers' Liability Act provides, "That every common

carrier by railroad engaged in interstate commerce shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier or by reason of any defect or insufficiency due to its negligence in its cars, engines, appliances, machinery, track, roadbed or other equipment."

The defendant has but two shops devoted particularly to the repair of locomotive engines. One is the shop located near Hoboken, N. J., and the other is located at Scranton, Pa. The plaintiff was employed as a mechanic and his principal work was in running a shaping machine, where he shaped parts to be used in the repair of locomotives that were in immediate need of repair. His work was known as rush work. His work was generally, but not exclusively, in the repair of locomotives used in interstate commerce. The power was applied to the shaping machine used by him from a countershaft and pulley attached by hangers to girders which were about eighteen feet above the floor of the shop. The defendant desired to move such countershaft for one reason to make room for another shaping machine, and to do so it was necessary to take the countershaft down and change the hangers on which it was suspended. On top of the girders from which the countershaft was suspended were the rails constituting the track upon which a traveling crane of heavy weight was moved. On a Sunday morning the plaintiff, working over time, with a helper,
was directed to move such countershaft and a platform or
166 scaffold was erected on which to do such work. The countershaft was taken down and placed upon the floor and while the plaintiff was engaged in making new holes in one of the girders for the purpose of fastening one of the hangers at its new proposed location and while he had his right hand over the rail on the girder in which he was making the holes, the crane was moved along without warning (as it is alleged) and a wheel cut off his hand. In his effort to save himself he involuntarily threw his left hand over the rail in front of the wheel and that too was cut off.

An examination of the record satisfies us that the question of the defendant's negligence was one of fact. The one important question for our determination in this action under the Federal Employers' Liability Act is whether the plaintiff at the time of the accident was within the meaning of that act engaged in interstate commerce.

The defendant is not liable under the act unless the plaintiff suffered injury while he was employed by the defendant as a common carrier in interstate commerce. (Illinois Central Railroad Co. v. Behrens, 233 U. S. 473.)

In the Behrens case it was held that a fireman employed on a switch engine in the city of New Orleans, the crew of which with said engine handled interstate and intrastate traffic indiscriminately, frequently moving both at once and at times turning directly from one to the other, was not engaged in interstate commerce or entitled to recover under the act for injuries arising by a collision when moving several cars loaded with freight which was wholly intrastate and upon completing that movement was to have gathered up and taken

to other points several other cars as a step or link in their transportation to various destinations within and without the state.

Whether the plaintiff can recover under the act depends upon whether he was personally engaged in interstate commerce at
167 the time of the injury. That he was not so directly engaged must be conceded. He claims, however, that he was so engaged within the interpretation given to the act in Pedersen v. D., L. & W. R. R. Co. (229 U. S. 146). In that case the plaintiff sought to recover damages for personal injuries against the same defendant as in the case now before us and in connection with commerce intrastate and interstate carried on by it over the same system of railroad. In that case the plaintiff was employed as an ironworker in connection with the repair of a bridge used by the defendant for railroad purposes near Hoboken. The repair consisted of the removal of a girder in a bridge in regular use and the insertion of a new one in its place. The plaintiff at the time of the accident was engaged in carrying from a tool car to the bridge certain bolts or rivets which were to be used in such repair. The bridge was used in interstate and intrastate commerce. The plaintiff was struck by an intrastate passenger train, and it was alleged that such train did not give any warning. Recovery was sustained, and the court say: "That the defendant was engaged in interstate commerce is conceded, and so we are only concerned with the nature of the work in which the plaintiff was employed at the time of his injury. Among the questions which naturally arise in this connection are these: Was that work being done independently of the interstate commerce in which the defendant was engaged, or was it so closely connected therewith as to be a part of it? Was its performance a matter of indifference so far as that commerce was concerned, or was it in the nature of a duty resting upon the carrier? The answers are obvious. Tracks and bridges are as indispensable to interstate commerce by railroad as are engines and cars, and sound economic reasons unite with settled rules of law in demanding that all of these instrumentalities be kept in repair. * * * We are of opinion that the work of keeping such instrumentalities in a proper state of repair while thus used is so closely related
168 to such commerce as to be in practice and in legal contemplation a part of it. * * * The true test always is: Is the work in question a part of the interstate commerce in which the carrier is engaged? * * * Of course, we are not here concerned with the construction of tracks, bridges, engines or cars which have not as yet become instrumentalities in such commerce, but only with the work of maintaining them in proper condition after they have become such instrumentalities and during their use as such.

"True, a track or bridge may be used in both interstate and intrastate commerce, but when it is so used it is none the less an instrumentality of the former; nor does its double use prevent the employment of those who are engaged in its repair or in keeping it in suitable condition for use from being an employment in interstate commerce." (p. 151.)

It is of great importance to employers and employees that rules be established by which it can be determined with reasonable cer-

tainty whether a person at a given time is engaged in interstate or intrastate commerce. It does not seem to us that each specific act of employment by a carrier can be satisfactorily defined and classified by generally and unqualifiedly including as a part of interstate commerce every act of employment closely connected therewith, and every act the performance of which is not a matter of indifference in such commerce.

It is not a matter of indifference to interstate commerce whether ore is mined and iron is manufactured, but employment in mining and manufacturing is so remote from the employment intended by the act that it would not, we assume, be claimed by any one that persons so remotely employed, even if so employed by the carrier, are engaged in interstate commerce within the meaning of the act. In every case a person to be protected by the Federal Employers' Liability Act must, by the express terms of the act, be engaged in commerce.

169 Conceding, as was held in the Pedersen case, that a person directly engaged in assembling material for the immediate repair of a bridge necessarily used in interstate commerce by a carrier, is engaged in interstate commerce, it does not follow that a person engaged at a shaping machine in a repair shop is engaged in interstate commerce, at least unless it appears that the work he is doing is for the immediate repair of a locomotive or other instrumentality actually engaged in interstate commerce. Making parts to be used in a locomotive is a step further removed from commerce than the assembling of parts for the locomotive, and corresponds to the work of making bolts and rivets for use in bridge repairs. If the plaintiff had been injured while engaged at the shaping machine in shaping parts for immediate use in a locomotive engaged in interstate commerce, it may be assumed that his claim would come within the terms of the statute, but if he was so engaged in shaping parts for a locomotive used in intrastate commerce, his claim would not, under the decision in the Behrens case, be included in the act.

The plaintiff in moving the countershaft was doing millwright work that in itself had no immediate or direct connection with commerce. He was not engaged in repairing or moving the shaping machine. The shaping machine was in no way affected by the operation of the crane. His work, in the most favorable light for the plaintiff, had to do with the supply of power to a machine that might thereafter be used in shaping parts for the repair of locomotives. It does not even appear that his work as a millwright was designed to bring about an improvement in the power or otherwise of the shaping machine that he had theretofore used. Even if it was designed to improve the power supplied to that machine, or to enable the defendant to add to the number of machines that could thereafter be used indiscriminately in shaping parts to repair interstate and intrastate locomotives, his work was at least one or more steps fur-

170 ther removed from interstate commerce than was the plaintiff's work in the Pedersen case. The rearrangement of the countershaft may have been desirable as a matter of shop arrangement or for economy, but it was not apparently essential for any

purpose. It was remote from any act of commerce. If the plaintiff, while engaged in millwright work, as appears in this case, can be said to have been engaged in interstate commerce, all work in the repair of the shop and shop machinery where interstate locomotives are repaired may in some remote degree be said to constitute commerce.

It was, of course, necessary in running the shaping machine to obtain power, and to obtain power it was necessary to burn coal, and to obtain coal it was necessary to perform other acts far removed from the purposes of the statute in question, but these several steps surely do not constitute interstate commerce by a carrier, or commerce of any kind.

Unless some reasonable and practical limit and boundary is prescribed in acts constituting employment in interstate commerce, every act that can be shown to have affected interstate commerce in a remote degree, is included within the terms of the statute. The decision in the Pedersen case has been frequently referred to as extending the provisions of the act to the limit of legislative intention, and we think it should not be by us further extended. The remedy of the unfortunate plaintiff is by the Compensation Act of the state of New Jersey, in which state the accident occurred.

The judgment should be affirmed, with costs.

SEABURY, *J.* (dissenting):

I dissent. The plaintiff was employed by the defendant in a repair shop devoted principally to the repair of locomotives transporting passenger and freight trains between Hoboken, N. J., and Scranton, Pa. The defendant had only two shops devoted to this pur-
171 pose. One was the shop in Hoboken where the plaintiff was employed, and the other was at Scranton. The "rush work" which plaintiff was employed to do consisted in repairing broken valves or other necessary parts of locomotives engaged in interstate commerce, although sometimes locomotives engaged in intrastate commerce were sent for repair to the shop where plaintiff worked. In the shop where plaintiff worked there was an electric crane used for transporting parts of locomotives from one part of the shop to the other. The crane operated on wheels which ran on rails or girders about thirty feet above the floor. The rails or girders were parallel and ran the whole length of the shop. The crane was operated by a man who sat in the center of it and it is said to have moved "the same as a trolley." When the crane reached its destination the operator lowered his "block and fall" and picked up whatever was required and the crane carried it to another part of the shop. It was not equipped with any signal. The only method by which workmen were warned that the crane was in motion was for the operator to shout, "Keep clear there" or "Get out of the way."

In the shop where the plaintiff worked there was a shaping machine. The function of this machine was to fashion keys, cotter pins and brasses to be used for keeping in place the piston rods in the crossheads of locomotives. The machine was driven by a countershaft which was affixed to the girder or rail upon which the wheels

of the electric crane traveled. On the day of the accident the plaintiff was engaged, under the direction of the superintendent, in repairing the shaping machine by moving it two feet to make room for the shaft. In removing it, it was necessary to take down the countershaft, to bore new holes in the girder and to refasten the hangers and countershaft so that the shaping machine could be used without interruption from the operation of the crane. While engaged in this work plaintiff stepped on the girder. Without
172 warning the crane came upon him and knocked him off the girder. In falling he threw out his left hand and caught hold of the rail. The crane cut this hand off and to keep from falling plaintiff again caught the rail with his other hand. This hand was also struck by the crane. The result of the accident to the plaintiff was that he lost both hands. The defendant offered no evidence. This action is brought under the Federal Employers' Liability Act of April 22, 1908 (35 Stat. at L. 65, chap. 149; U. S. Comp. Stat. Supp. 1911, p. 1322). The act provides:

"That every common carrier by railroad engaged in interstate commerce shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier, or by reason of any defect or insufficiency due to its negligence, in its cars, engines, appliances, machinery, track, roadbed or other equipment."

The verdict of the jury established that the injuries which the plaintiff sustained were due to the negligence of the defendant. The learned Appellate Division reversed the judgment entered upon the verdict of the jury in favor of the plaintiff on the ground that the plaintiff was not at the time of the accident engaged in interstate commerce. In the opinion below two suggestions are made which seem to me to have no importance in this case. One relates to the fact that at the time of the accident the plaintiff was engaged in Sunday work, from which the inference is suggested that this was not the regular work of the plaintiff. The fact shown by the evidence is, that repair work in this shop was done on Sundays as well as on other days and the fact that the plaintiff was engaged in Sunday work injects no exceptional feature into the case. The other suggestion, made below, is that the shop in which plaintiff worked was also used as the repair shop of a railroad which had extensive local service in which the locomotives were used only in intra-
173 state commerce. It appears from the testimony that the "rush work" upon which plaintiff was engaged was generally done upon locomotives used in interstate commerce and that this was the principal work of that shop. Upon the trial it was conceded that the defendant at the time of the accident was engaged in interstate commerce. The claim is made that the plaintiff was not at the time of the accident engaged in interstate commerce. If the plaintiff had been engaged at the time of the accident in working upon a locomotive engaged in interstate commerce, it is conceded that he would be within the Federal statute. Is he without the protection of this statute because he was working to put in order a machine that

was to be used in repairing locomotives engaged in interstate commerce? In my opinion he was not. The work of repairing the shaping machine was not independent of interstate commerce. It was essential to the carrying on of that commerce. The work of putting that machine in order so that it could be used in the repair of locomotives engaged in interstate commerce, was just as much an act of interstate commerce as if the work had been done upon such a locomotive. The work in which the plaintiff was engaged was, as the United States Supreme Court said in the Pedersen Case (229 U. S. 146), "so closely related to such commerce as to be in practice and in legal contemplation a part of it." In that case it was held that a plaintiff who was acting under the direction of his foreman and injured while carrying bolts from a tool car to a bridge which was used in interstate commerce, was engaged in interstate commerce. In his opinion, rendered in that case, Mr. Justice Van Devanter said: "The point is made that the plaintiff was not at the time of his injury engaged in removing the old girder and inserting the new one, but was merely carrying to the place where that work was to be done some of the materials to be used therein. We think there is no merit in this. It was necessary to the repair of
174 the bridge that the materials be at hand, and the act of taking them there was a part of that work. In other words, it was a minor task which was essentially a part of the larger one, as is the case when an engineer takes his engine from the round house to the track on which are the cars he is to haul in interstate commerce" (p. 152).

This is a case where the plaintiff was injured while engaged in the performance of an act necessary to maintaining in proper condition the shaping machine which was as much an instrumentality of interstate commerce as are bolts used in the repair of a bridge. Without this machine the locomotives engaged in interstate commerce could not have been repaired and put in a condition to be used in such commerce. It may have been minor work, but it was none the less an essential part of the larger work of putting in repair locomotives engaged in interstate commerce. The Pedersen Case (supra) seems to me to sustain the contention of the plaintiff that at the time of the accident he was engaged in interstate commerce. Since that case was decided it has been held that a boilermaker's helper employed in the shop of a railroad company, injured while assisting in the repair of an engine used in interstate commerce, is within the statute. (Law v. Illinois Central R. Co., 208 Fed. Rep. 869.) In the recent case of Barlow v. Lehigh Valley Railroad Co. (214 N. Y. 116, 119) it was said by Judge Miller, speaking for this court: "If the plaintiff had actually been coaling an engine preparatory to its moving interstate cars, he would plainly have been engaged in interstate commerce. * * * The placing of the coal cars on the trestle was one step removed from such work, but it was certainly no more remote than the carrying of bolts to repair a bridge, which was held to be so closely connected with interstate commerce as to be a part of it."

In the Pedersen Case (supra) the court said: "The true test always

is: Is the work in question a part of the interstate commerce
175 in which the carrier is engaged." It is clear that the construction of tracks, bridges, engines or cars or shops to be used for the repair of such cars is not an act done in interstate commerce, because until constructed these things "have not as yet become instrumentalities in such commerce." But after these things have been constructed and have been used as instrumentalities of such commerce, the work of maintaining them in proper condition is work done in interstate commerce. Such is, as I understand it, the rule which the United States Supreme Court has applied in its construction of the Federal Employers' Liability Act and I think that we should apply it to this case. The test prescribed in the Pedersen Case (supra) has the merit of definiteness. It draws a line of distinction between construction and the work of maintaining in proper repair. Until the track or bridge or car, shop or whatever it is, actually becomes an instrumentality of interstate commerce the provisions of the Federal statute have no application. After construction, and after it has been placed in use and has taken on the character of an instrumentality of interstate commerce, any act done in maintaining it is within the Federal statute. One of the chief merits of the construction put upon the statute by the United States Supreme Court is the clearness with which it defines the line of demarcation between what is and what is not within the statute, and thus provides a definite test by which the person injured may determine whether his remedy is under the Federal statute or under the state law. The fact that the shaping machine upon which the plaintiff was working was used to repair locomotives engaged in intrastate commerce, as well as locomotives engaged in interstate commerce, did not cause it to cease to be an instrumentality of interstate commerce. In the Pedersen case it was said: "True, a track or bridge may be used on both interstate and intrastate commerce, but when it is so used it is none the less an instrumentality of the former."

176 In my opinion this case is within the provisions of the Federal statute as that statute has been construed by the United States Supreme Court. I, therefore, vote in favor of the reversal of the judgment of the Appellate Division which reversed the judgment entered upon the verdict of the jury in favor of the plaintiff.

Willard Bartlett, Ch. J., Hiscock, Cuddeback and Miller, JJ., concur with Chase, J.; Seabury, J., reads dissenting opinion, and Cardozo, J., concurs.

Judgment affirmed.

177 [Endorsed:] File No. 24,744. Supreme Court U. S. October term, 1914. Term No. 1000. Bruce Shanks, Pl'ff in Error, vs. The Delaware, Lackawanna & Western Railroad Company. Stipulation of counsel and addition to record. Filed June 10, 1915.

Endorsed on cover: File No. 24,744. New York Supreme Court. Term No. 477. Bruce Shanks, plaintiff in error, vs. The Delaware, Lackawanna and Western Railroad Company. Filed May 21, 1915. File No. 24,744.

Supreme Court of the United States

OCTOBER TERM—1914.

No. 1000.

BRUCE SHANKS,
Plaintiff-in-Error,
vs.
THE DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY,
Defendant-in-Error.

Motion to Advance.

Plaintiff-in-Error, Bruce Shanks, moves the Court to advance this case and to take it up out of its order on the docket. This case comes into this court by virtue of a writ of error granted by Mr. Justice Hughes, and has been docketed as No. 1000, October, 1914, Term. The question upon this appeal involves the construction of the Federal Employers' Liability Act, being 35 Statute at Large, 65, Chapter 149, which became a law on April 22nd, 1908. The Court of Appeals of the State of New York in its prevailing opinion, says:

> "An examination of the record satisfies us that the question of defendant's negligence

was one of fact. The one important question for our determination in this action under the Federal Employers' Liability Act, is whether the plaintiff at the time of the accident, was within the meaning of that act, engaged in interstate commerce."

The affidavit of Bruce Shanks, filed in support of this motion, sets forth the essential facts and reasons for the desirability of a speedy determination. A decision of this Court is of the utmost importance to the employees of interstate commerce railroads, and the public. There is a conflict of decisions in the various state and circuit courts, as well as the Workmen's Compensation Commission of the State of New York, and one of the main questions is whether there is protection under the act for those employed in the repair shops of such railroads or only for those who are actually employed in the transportation between states. There is serious doubt also as to whether the decision of this Court in the case of Illinois Central Railroad Company vs. Behrens (233 U. S., 473), has limited, overruled or modified Pedersen vs. The Delaware, Lackawanna & Western Railroad Company (229 U. S., 146).

Notice of this motion has been given opposing counsel.

June / , 1915.

Respectfully submitted,

Joseph A. Shay

Attorney for Plaintiff-in-Error.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM—1914.

No. 1000.

BRUCE SHANKS,
Plaintiff-in-Error,
vs.
THE DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY,
Defendant-in-Error.

State of New York,
City of New York, } ss.:
County of New York,

Bruce Shanks, being duly sworn, deposes and says that he is the plaintiff-in-error herein. Deponent recovered a judgment against the defendant-in-error for the sum of Forty Thousand Dollars ($40,000) in the Supreme Court of the State of New York, Kings County, for personal injuries sustained by him resulting in the amputation of both his hands at the wrist, caused by the negligence and carelessness of the defendant and one of its employees in the negligent and careless operation of an overhead traveling crane in its repair shop at Kingsland, New Jersey.

Upon the trial of the case defendant denied its liability,

FIRST.—Upon the ground that deponent was not entitled to recover, because at the time of the hap-

pening of the accident he was not engaged in interstate commerce within the meaning of the said Act.

SECOND.—That he was not injured through the negligence of the defendant or any of its employees.

THIRD.—That he contributed to his own injury. The Trial Judge held that under the authority of Pedersen vs. The Delaware, Lackawanna & Western Railroad Company (229 U. S., 146), deponent was engaged in interstate commerce and submitted the questions of negligence contributory negligence and assumption of risk to the jury.

That thereupon said defendant appealed to the Appellate Division of the Supreme Court, in and for the Second Department, from said judgment, and that Court reversed the judgment and dismissed the complaint upon the first ground asserted by said defendant, and cited the decision of this Court in the case of Illinois Central Railroad Company vs. Behrens (233 U. S., 473). One of the Justices of said court dissented from said judgment, and held in support of his contention that deponent was engaged in interstate commerce at the time, under the aforesaid decision of Pedersen vs. The Delaware, Lackawanna & Western Railroad Company.

That deponent thereupon appealed to the Court of Appeals of the State of New York from the judgment of said Appellate Division from said direction and dismissal of the complaint, and the latter Court, also relying upon the Behrens decision, affirmed said judgment of the Appellate Division. Two of the Justices, namely, Samuel Seabury and Benjamin N. Cardoza dissented from the

judgment of affirmance upon the ground that at the time of the happening of the said injury deponent was engaged in interstate commerce within the case of Pedersen (supra).

Deponent was employed in the shops of defendant, engaged in the repair of its locomotives. His work was known as "rush work" and this term had reference to the repair of locomotives engaged in that commerce. Such engines had to be repaired without delay. The engines engaged in intrastate work, while also repaired in that shop, were replenished by other engines. Their repair was not so imperative. At the time of the injury, he was engaged in the removal, resetting and putting in order for further use, a shaping machine for the making of necessary parts used in the repair of locomotives engaged in both interstate and intrastate traffic, but used by deponent in his so-called "rush work." Deponent claims that said machine, being the only one of its kind owned or maintained by defendant in the State of New Jersey (the other being in its other locomotive repair shop in the State of Pennsylvania) and used by it in the repair of interstate engines, was an instrumentality of said commerce, and so closely connected therewith, as to form a part thereof, and claims that the machine, as the bridge in the Pedersen case, was indispensable and essential to such interstate commerce, and without which, commerce would be interrupted. Mr. Justice Seabury said in his opinion:

> "The work of putting the machine in order so that it could be used in the repair of locomotives engaged in interstate commerce, was

just as much an act of interstate commerce, as if the work had been done upon such a locomotive."

Defendant-in-error contended that the work being done by deponent was not commerce, and though deponent was employed in interstate commerce, the work done by him at the time of the injury was independent of such commerce and in no way connected with it within the Behrens decision (supra).

The questions to be determined by this Court are of great public importance. The numerous railroads of this country and the thousands of employees engaged in such commerce, as also the Courts of the States and the many litigants whose actions are now pending and involving the precise construction of the act, as well as the many future litigants, are interested in knowing whether the act is designed to protect one injured in the repair shops as distinguished from one injured while engaged in the actual transportation from one state to another, that is to say, the repair department as distinguished from the new construction department. Deponent is informed and believes that there is also a grave question as to whether the Behrens decision has limited, modified or overruled the ruling of the Pedersen case.

Deponent is informed that since the rendition of the Behrens decision by this Court, there have been many conflicting decisions of the Courts of this state and many other states and the United States District Courts, and also by the State Workmen's Compensation Commission of this State, the result being that great numbers of in-

jured employees and the railroads are at a disadvantage because of this uncertainty.

Deponent is further advised by counsel and verily believes that the facts of his case are peculiarly adapted to a decision which will clarify the situation, will render much aid to the Bench, the Bar and the Public, and because it is of such vital importance, a speedy determination would be advisable.

As a further reason for an early determination, deponent urges that he received his injuries on January 14th, 1912, therefore three and one-half years have intervened, since which time he has been unable to perform labor of any kind and has therefore been deprived of his earning power, and because of the severity of the injuries, he will remain in that predicament for the rest of his life. Deponent is penniless, and has been permitted to remain at the hospital to which he was taken at the time of the accident. The record discloses that at the time of the accident, deponent was earning about $800 a year, before which he earned about $2,000 a year. His stay at the hospital, however, is subject to the wishes of the authorities, and at any time he is likely to be requested to leave, in which event he would become a public charge.

Bruce Saules.

Sworn to and subscribed before me this
5th day of June, 1915.

W. Livingston

Commissioner of Deeds.

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In the Supreme Court of the United States

OCTOBER TERM, 1915

No. 477

BRUCE SHANKS,
Plaintiff-in-Error,

against

THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY,
Defendant-in-Error.

Brief of Plaintiff-in-Error

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In the Supreme Court of the United States

October Term, 1915

No. 477

BRUCE SHANKS,
Plaintiff-in-Error,
vs.
THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY,
Defendant-in-Error.

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In the Supreme Court of the United States

October Term, 1915

No. 477

BRUCE SHANKS,
Plaintiff-in-Error,
vs.
THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY,
Defendant-in-Error.

THE GENERAL NATURE OF THE CASE

This case involves the consideration of that Statute of the United States which is commonly known as the Federal Employers' Liability Act of 1908, being 35 Statutes at Large, 65, Chapter 149. It comes here from the New York Court of Appeals by writ of error allowed by Mr. Justice Hughes; and it has been advanced to the summary docket upon motion.

Plaintiff was terribly injured in January, 1912, while engaged in shifting or moving the countershaft of a shaping machine at which he was employed in defendant's railroad shop at Kingsland, New Jersey. He was standing upon a rail or girder some eighteen feet above the floor, when a traveling crane came along and struck him, causing him to fall. As he threw his arms over the rail to save himself the crane passed first over one hand and then over the other, so injuring them that both were amputated at the wrists. He is now a helpless cripple, and while it is unnecessary to discuss the injuries at any length, as no serious question will or can be raised here as to the amount of the verdict, it may still be proper to observe in passing that they were of such a serious and terrible nature that none of the State courts have even as much as suggested that the rather substantial verdict of Forty Thousand Dollars is, in any sense, excessive.

Defendant is and was in interstate carrier engaged in interstate commerce within the meaning of the Statute, this fact being expressly conceded upon the record (fol. 157). The plaintiff is a resident of New York State, and contending that he was employed in such

commerce at the time of his injury, he predicated his cause of action upon the Federal statute, and brought and tried his case, in the first instance, in the Supreme Court of the State of New York. In that court he was successful, the jury awarding him a verdict of Forty Thousand Dollars, and finding in his favor upon the issues of negligence and contributory negligence, upon evidence which is nowhere in serious dispute, but which, in any event, has received the sanction and approval of all the State courts. (See opinions New York Appellate Division and Court of Appeals, pages 121-143 of the record).

Nor is any question raised as to the pleadings, the record showing, at fol. 61, that the defendant has expressly conceded that the complaint is sufficient and proper in all respects.

But the New York Appellate Division and Court of Appeals, while admitting the substantive merits of the case, have still reversed and annulled the judgment of the Supreme Court, each of these appellate tribunals basing its adverse decision upon the sole ground that the plaintiff was not, at the time of his injury, "employed in interstate commerce"

within the meaning of the Federal Act of 1908, which reads as follows:

> "That every common carrier by rail
> "road engaged in interstate commerce
> "shall be liable in damages to any per-
> "son suffering injury while he is em-
> "ployed by such carrier in such com-
> "merce, resulting in whole or in part
> "from the negligence of any of the offi-
> "cers, agents or employees of such car-
> "ier, or by reason of any defect or insuf-
> "ficiency due to its negligence, in its
> "cars, engines, appliances, machinery,
> "track, roadbed or other equipment."

There being then no question of pleading or practice, and the merits of the case not here in dispute, the single issue which remains for this court may be considered entirely free of all extraneous matters. It relates to the legal status of the work in which plaintiff was engaged at the precise time of his injury, and resolves itself at once into this well-defined proposition of law: Was the plaintiff-in-error, at the time of his injury, employed in interstate commerce, within the meaning of the Statute? If so, he is entitled to recover, and the writ must be sustained; if not, the cause of action wholly fails.

THE FACTS OF THE CASE.

Stated in briefest summary, the essential facts proven by the plaintiff and found in his favor by the trial jury were these:

Defendant, in the operation of its vast railway system, a portion of which ran between Hoboken, N. J., and Scranton, Pa., maintained a railroad repair shop at Kingsland, N. J. **This was the only shop in that entire State where defendant's interstate locomotives could be repaired.** (fols. 105-106). For this purpose the engines were sometimes hauled into the shop, while at others the damaged parts were sent there from the roundhouse to be repaired and returned (fols. 105-67). In the case of local trains, whenever the engines were damaged or out of repair it was the practice to supply other engines at once, extras being kept at hand for that purpose, and there being thus no particular hurry about the repairs, (fol. 67); but in the case of interstate locomotives, repairs had to be made in a hurry, to avoid serious interference with the traffic, and such repairs were for that reason known as "**rush work.**" It was in this "**rush work**" that plaintiff was engaged, the testimony upon the subject being this:

"Q. What was your principal work in "the shops there?

"A. The work I was engaged in was "rush work. These engines would be "pulled into Hoboken, and if anything "would be wrong they would send the "parts to Hoboken, and I would have to "get those parts—they would be pulled "into the roundhouse and the parts "would be sent up to Kingsland to be re-"paired right away and sent back.

"Q. And that was what was called "rush work, was it?

"A. Yes, rush work.

"Q. Was the rush work on the local "locomotives or the locomotives used in "going out of the State?

"A. **The rush work would be gen-"erally on the ones going out of the "State, the others they have got extra "engines there to pull them out.** (fols. 65-66).

* * * * * *

"If there was broken valves or broken "valve yokes or what we call binders, "parts like that, we would have to get "those parts forge-drilled, and all the "work done on them, and send them "right back to Hoboken, Secaucus and "Port Morris, all the different round-"houses. (fol. 67).

This was the plaintiff's usual and ordinary work, although at times he did other things, when there was no rush work to do. The testimony upon the subject is important and reads as follows:

"Q. Was that your special work?
"A. Yes, sir.
"Q. For how long were you engaged "in that work?
"A. For one year and ten months.
"Q. All the time you were with the "company?
"A. Yes, sir.
"Q. At any time were you ever called "off that work?
"A. Yes, sir, if there was no work "coming from these places I would have "to do what was called millwright work, "keep the machines in repair, but if any-"thing came from these places I would "have to drop this and go on the other "by orders of the foreman. (fols. 67-68).

Having now the status of the defendant fixed by concession as that of an interstate carrier, and the repair shop devoted generally to the repair of its interstate locomotives, and the plaintiff generally employed in such interstate repair work, which was known as

rush work; and it being also shown that there was a necessity for haste in these repairs because of their direct importance to the traffic, which did not exist as to local trains; and the nature of this work being found to consist in part of the hurried repairs to broken valves, binders and similar parts, we turn to the next question, as to how the plaintiff did this work and by what instrumentality.

Upon this subject the evidence shows that the articles used in the rush work,—the keys, cotters, bushings and the like,—were all made and repaired in shaping machines, of which there were only two in the shop; and **therefore there were only two such machines in the only shop of the kind in the state.** The testimony is this:

> "Q. Did they have any other machine "such as that in the yard?
>
> "A. No, there were just two of these "shaping machines in that shop for this "work." (fols. 78-79).

Indeed, it may fairly be said that there was only one such machine in use prior to the accident; for while there seems to be no direct evidence upon the subject, it is fairly inferable from the proof, and appears to have been

so considered by all the courts below, that the second machine was about to be installed.

With this further fact thus established, it remains to consider how many men did this rush work, as bearing upon the importance of the plaintiff's operations and their relation to the traffic itself. The answer to this question presents one of the most significant and vital facts of the controversy; **for the proof shows that this plaintiff was the only man in the entire state who did the work.** The testimony is this:

> " The Court: You mean you were the
> " only man that did that kind of work?
> " Witness: Yes, sir; and all the work
> " was brought to this bench; all the rush
> " work from the roundhouse, and I did
> " that right away." (fols. 98-67).

From these clearly established and practically undisputed facts, it may fairly be inferred, for we have the benefit here not only of the facts actually proven, but also of such inferences as may reasonably arise therefrom, that upon this man and his work at that one machine there depended, in direct and vital manner, a portion of the interstate commerce of that vast railroad system; because without

this man the rush work,—the repairs to interstate engines,—could not go on, until some one might be substituted in his stead; and in the meantime every train whose engine was out of repair must stand idle upon the rails.

And it may be further stated as an established fact of the case, for it is the only reasonable inference which may be drawn from the evidence, that this shaping machine was an indispensable instrumentality of interstate commerce, which depended upon it, directly and vitally; because without the machine, working freely and economically, not one of these necessary parts, used in the rush work, could be made or repaired.

Having thus fixed the precise status of the man and the machine, as the record presents it,—the general and special work of each in their close relation to interstate commerce, let us turn now to the exact nature of the work which he was performing at the very moment of his injury. This is an important, and by many considered indeed the crucial test, of such a controversy.

The plaintiff's machine was operated by a countershaft, which in turn was connected with the main shaft by a belt. On the day in question, Sunday, he was instructed to change

the location of this countershaft, and it was while doing that work that he was injured. (fols. 74-76-77-80). The countershaft was attached by hangers to a girder about eighteen feet above the floor, into the bottom of which the hangers fastened with four bolts. It was to be moved or shifted about two feet from its original position, and scaffolds had been erected for the convenience of the plaintiff in doing the work. (fol. 75). After working some time he had finished shifting one of the hangers and was about to place the other in position when the accident happened. (fol. 79). Its immediate cause was an electric crane which ran through the shop overhead, on a rail which was fastened to the girder. While plaintiff was at work on the girder this crane came along, without warning or signal of any kind, and cut off both his hands. The testimony upon this subject is undisputed, the defendant having stated at the trial that it desired to raise no issue of fact in that regard. (fol. 226). It reads as follows:

> "I then stepped on the rail of the "girder, on the edge of the girder, to see "if you could fix it from the other side, "but before doing that I looked along "the rail and saw the crane was station-

" ary. I then turned around to my help-
' er and asked him to hand me up the
" lath on which I had the distance
" marked where the hanger was to be ap-
" plied. In the meantime the crane came
" along right down on top of me, with-
" out any signal whatever. The force of
" the crane drove me off the girder, I felt
" myself falling, and I threw out my left
" hand and caught the rail with it. The
" crane then stopped. One hand had
" been cut clean off, and the wheel of the
" crane stopped on the other hand. I was
" suspended by this hand until brought
" down by a helper." (fols. 79-80).

It is not necessary to further discuss the details of the evidence as they may relate to the questions of negligence and contributory negligence. As mentioned above, these are out of the case; but it will do no harm to observe in passing that the operator of the crane could have seen the plaintiff had he looked, but instead of doing so, drove it against him without shout or warning of any kind, (fols. 80-81); and the negligence of the master in failing to provide suitable rules and signals were fully proven (fols. 81-82-84). The plaintiff hearing no signal, and hav-

ing seen that the crane was stationary when he looked an instant before, was properly absolved from the charge of contributory negligence by the jury, inasmuch as the crane moved at irregular intervals, and although it made some noise, this would be drowned by the hum of the other machines near by (fol. 140).

From this brief summary, containing, as it does, the result of practically undisputed evidence, the following essential facts, which bear with direct and potent force upon the crucial test of the case, stand out in bold relief:

First—The status of the defendant as an interstate carrier engaged in interstate commerce has been fixed by concession of the parties.

Second—The repair shop in question was devoted generally to the repair of interstate locomotives; or, if not that, it was at least used indiscriminately for intrastate and interstate repairs.

Third—The plaintiff-in-error was generally employed in repair work in this shop, which referred practically exclusively to interstate locomotives, and which was known as rush work.

Fourth—In this rush work there was a necessity for haste, because of its direct importance to the interstate traffic; a necessity which did not exist as to local trains, for which extra locomotives were provided in case of accident.

Fifth—The rush work—these repairs to interstate engines—consisted in the hurried making, drilling and repairing of broken valves, binders and similar parts; and among other articles used were keys, cotter pins and bushings, needed for the repairs of piston-rods and other similar parts.

Sixth—These articles were made in a shaping machine, of which there were not more than two in this, the only shop, in the State. At these machines there must be made and formed in a hurry all keys, cotters, bushings and similar articles so frequently needed for quick repairs. And only one of these machines had been in use, so far as the proof shows.

Seventh—**The plaintiff was the only man engaged in this work at the only machine used for that purpose in the only shop in the whole state of New Jersey.**

Eighth—Upon the plaintiff, and his work at that machine, there depended, in great measure, the interstate commerce of that part of the road; because, without him and his

work, the repairs to interstate engines could not be made, and all interstate locomotives out of repair in these respects must stand idle until another man and another machine could be provided.

Ninth—As the man himself bore such a direct and substantial relation to interstate commerce, so also was the shaping machine an indispensable instrumentality of that commerce; and as the commerce depended upon the man, so also did it depend upon the machine; because without the machine, working freely and well, he could not perform his rush work and the repairs could not be made.

Tenth—The countershaft was an inherent and essential part of the machine, without which it could not operate for a moment, and with which it was connected, and from which it secured its power. The repairing or readjustment of the countershaft was therefore, in a legal and practical sense, the repairing and readjustment of the machine itself. The countershaft was as much part of the machine as would be the wheel a part of a wagon, or the piston-rod a part of the engine. It was indeed the main artery which supplied its very life-blood and strength.

Eleventh—At the time of the injury the machine was necessarily out of commission,

because the countershaft was being moved; therefore, until the work was completed, it was impossible to use the machine; from which it follows that until the countershaft should be rearranged the rush work could not be done, and repairs to interstate locomotives must be impeded, if not wholly stopped.

We have thus briefly stated some of the essential features of the evidence, and suggested these many conclusions therefrom, because it has seemed necessary to the proper discussion of this case that the close interrelation of the one fact to the other be clearly set forth in its logical order. From these facts thus developed, and the inferences and conclusions which must necessarily follow, we assert with confidence that there was, as matter of law and as matter of fact, such a close and direct connection between the work which the plaintiff was doing at the time of his injury, and the movement of the interstate trains of this vast railway system, as to render that work a part and parcel of interstate commerce, within the meaning of the statute; and all this, we think, will be fully demonstrated by reference to the many authoritative decisions which are to be found cited and discussed in the later pages of the brief.

It is true that plaintiff's act was but a minor task,—it was nevertheless a detail of the greater work. Without the keys, and cotters, and bushings, not a single interstate locomotive at that end of this vast railway system could move when out of repair in these respects; without the shaping machine not a single key or cotter could be repaired or formed; without the countershaft the shaping machine could not operate, and until the repair and readjustment of the countershaft had been finished, it could serve no useful purpose. The connection then was real and substantial, direct and positive.

It has been now several times asserted, and perhaps ought not to be repeated, that there is very little dispute upon these facts; but if there may be found anywhere in the record some real or pretended question as to the significance of the evidence, then we assert with confidence that any such doubt must be here resolved in the plaintiff's favor, and the case argued and decided upon the theory that he is entitled to the benefit, not only of the facts actually and necessarily involved in the undisputed findings of the jury, but also of such other facts as that body might fairly have found upon the evidence. Such is the

time-honored rule, as it prevails in the State of New York; for the Court of Appeals has no jurisdiction to review the weight of evidence, and may only inquire into the facts with a view of determining whether or not there was any evidence to support a finding. Indeed, such was the precise theory upon which this case was decided by the New York Court of Appeals, although, as we shall indicate later, that court seems to have misinterpreted the evidence in some very material respects.

It may then be premised that the plaintiff-in-error may here safely claim the right to at least a fairly liberal interpretation of the evidence, as this court shall proceed to exercise its power to analyze the same to that extent necessary to determine the question whether there has or has not been a denial of any of the privileges and immunities granted by a statute of the United States, specially set up and claimed in the pleadings. This, we understand, is within the province of the court in such cases, where a federal question is involved.

Southern Pacific v. Schuyler, 227 U. S. 601, 611.

North Carolina v. Zachary, 232 U. S. 259.

Kansas City v. Albers, 223 U. S. 573, 591.

Cedar Rapids v. Cedar Rapids, 223 U. S. 655, 668.

Creswill v. Knights of Pythias, 225 U. S. 246.

THE HISTORY OF THE CASE.

The legal history of this case, during its progress through the various courts of the State of New York, is instructive of the frailities of human judgment, and offers a perfect illustration of the difficulties which sometimes arise from the use of the most plain and simple terms, in statutes concerning which there should of right be no doubt whatever. This statute was enacted in deference to the advanced thought of a nation, and the lofty conception of its people of their duty to humanity; it was intended to protect the laboring classes by equalizing the burdens of injury and death, and to promote the interests of commerce by insuring greater efficiency and safety; and it was undoubtedly the thought and purpose of Congress that it should be liberally construed and in such manner that its blessings might not be difficult of enjoyment. And yet, although it is a

fact that up to March, 1915, it had been passed upon twenty-nine times by this court and hundreds of times by other state and national tribunals, as was observed by Mr. Roberts in his recent work upon the subject, its application to the simple facts of a given case is still in doubt; and none of the rules which have been so many times stated and reiterated by this court as the test of its application, have sufficed to command anything like a unanimous interpretation. The more remarkable is this in view of the fact that all of the jurists of the state who have considered the case at bar have cited the same decisions of this court in their opinions, but with widely divergent views as to their effect. These various opinions warrant at least very brief mention at this stage of the discussion.

In the trial court Mr. Justice Kelly thought there was so little doubt upon the subject that he did not thoroughly understand that any real question was to be raised concerning the proposition which now engages attention. This is indicated by his remarks, contained in the opinion written upon the denial of the motion for a new trial, and to be found at page 115 of the record. The learned Justice there says:

"I find that defendant's counsel de-
"votes a large part of his very able brief
"to a discussion of the question, whether,
"at the time of the accident, the plaintiff
"was engaged in interstate commerce. I
"am free to say that I did not under-
"stand at the trial that there was any
"question about it. Before charging
"the jury, I offered to submit the ques-
"tion to the jury, and the learned coun-
"sel for the defendant stated upon the
"record that the defendant did not wish
"to raise that issue with the plaintiff."

In another part of the opinion, he goes into the substantive law of the case at considerable length as follows:

"But, if there was any question about
"it, I think the matter is settled conclus-
"ively in plaintiff's favor by the decis-
"ions of the Supreme Court of the
"United States in Mondou v. N. Y., N. H.
"& H. R. Co., 223 U. S. Supt. Ct. 1, and
"the other cases in the series there re-
"ferred to, and again in Pedersen v. D.
"L. & W. R. Co., 229 U. S., Sup. Ct. 146.
"In the last case, Judge Van Devanter,
"writing for the Court, says: 'The true

" ' test always is: Is the work in question
" ' a part of the interstate commerce in
" ' which the carrier is engaged?' The
" plaintiff in the case at bar was engaged
" in a repair shop which was devoted
" particularly to work on locomotives
" running between Hoboken, N. J., and
" Scranton, Pa. There were but two shops
" devoted to this kind of work, one in
" New Jersey and the other in Pennsyl-
" vania. ' Rush work ' as it was desig-
" nated. His claim on the trial was that
" he was engaged exclusively on that
" work, and defendant stated, as before
" suggested, that it raised no question
" about his evidence. The plaintiff's
" case is much stronger in this regard
" than the cases cited. This plaintiff was
" not working on tracks, sidings, bridges,
" or coal trestles, which might be used
" for various kinds of traffic, and in such
" cases it has been held that the em-
" ployee comes within the protection
" of the act of congress. He was work-
" ing on the locomotive engines devoted
" exclusively to interstate traffic—' rush
" ' work.' It seems to me that he was al-
" most in the same category as the engi-
" neer and fireman and I can add nothing
" to the opinion in the Pedersen case.

"If the defendant was engaged in in-
"terstate commerce which is admitted,
"and if the plaintiff was engaged in inter-
"state commerce, which I think is ad-
"mitted on the record, but if not, it is to
"my mind established beyond a question
"under the rules laid down by the Fed-
"eral Supreme Court, then the New Jer-
"sey Compensation Act does not apply
"because it is superseded by the Federal
"Act and the expressed constitutional
"grant to Congress of the right to regu-
"late interstate commerce.

Now this appeared to the plaintiff's counsel to be a fairly correct interpretation of the statute, as it should be tested by the standard laid down by Mr. Justice Van Devanter in Pedersen v. D. L. & W. (229 U. S. 146); but it did not so appeal to the Appellate Division of the State of New York. In that court Mr. Justice Putnam, writing the prevailing opinion, held to the exact contrary, although predicating his ruling in part upon the same decisions. This opinion, however, was not unanimous, as Mr. Justice Burr dissented, in a memorandum to which we invite the attention of this court as a perfectly correct and lucid interpretation of the real law of the

case; for that learned Justice has carefully noted and skillfully analyzed, in logical and concise form, many of the more important decisions upon the subject, and has reached a conclusion which we believe to be more nearly in harmony with the rulings of this court than are any other of the expressions of the various State judges. In other words, we submit that Mr. Justice Burr, of the New York Appellate Division, was right in all that he said in his dissenting opinion, and that his views may well commend themselves to this court in that final analysis of the case which is now to be had. The opinion of Mr. Justice Putnam is to be found at page 121 of the record, and that of Mr. Justice Burr at page 123.

Finally the case went to the New York Court of Appeals, and in that court also there was a serious controversy upon this one question of law. The decision of the Appellate Division was affirmed, and the plaintiff defeated, but again by a divided court. The prevailing opinion was delivered by Judge Chase, while Judge Cardoza and Judge Seabury dissented, the latter writing an exhaustive discussion of the law of the case in support of the views of the dissenting judges. These opinions are to be found at pages 143

and 147 of the record, and the case is reported below in Shanks v. D. L. & W. (214 N. Y. 413-420), Judge Chase predicating his ruling largely upon the decision of this court in the Behrens case, while Judge Seabury reached the conclusion that the controversy was more to be likened unto Pedersen v D. L. & W., and was even stronger for the plaintiff than was that case.

Such is the legal history of this much argued case,—of the thirteen state judges who have passed upon its merits in the courts of New York, four have arrayed themselves on the one side of the legal question, nine upon the other. In this situation, as we come here for the final word, it is perhaps needless to assert that this is an issue worthy of the most serious discussion and consideration, not only because of its vital import to the plaintiff, whose all is staked upon the result; but also because of the far reaching significance which the decision must have upon hundreds, if not thousands, of similar causes, which must from time to time engage the attention of the courts. In this lies the excuse for what might otherwise be considered an unusually long and voluminous argument.

There being but one question of law involved, the remaining pages of the brief will be devoted to the discussion of a single point, in which the plaintiff-in-error hopes to demonstrate, beyond the peradventure of a doubt, that he was at the time of his injury employed in interstate commerce, within the meaning of the statute, and is therefore entitled to all its privileges and immunities. These privileges and immunities having been denied him by the adverse decisions of the Appellate Division and Court of Appeals of the State of New York, it is respectfully submitted that those decisions should be annulled and reversed, and the judgment of the New York Supreme Court reinstated and enforced.

POINT I

As matter of fact, and as matter of law, this plaintiff was employed in interstate commerce at the time of his injury, within the meaning of the Federal statute, as it has been construed and applied in every authoritative decision.

The substantive law of this controversy is plainly and concisely written in Pedersen v. D. L. & W. (229 U. S. 146-151), a case very similar in fact and absolutely identical in principle. In that decision, Mr. Justice Van Devanter has deliberately stated a plain and comprehensive test of the statute, which ought not to be difficult of application to any given state of facts. We quote from the language of the opinion at some length, because the expressions there used have already many times been considered a safe and sure guide for the judicial conscience, as this and other national and state tribunals have struggled with the question of law which is now presented:

> "That the defendant was engaged in
> "interstate commerce is conceded, and
> "so we are only concerned with the na-

" ture of the work in which the plaintiff
" was employed at the time of his injury.
" Among the questions which naturally
" arise in this connection are these: Was
" that work being done independently of
" the interstate commerce in which the
" defendant was engaged, or was it so
" closely connected therewith as to be a
" part of it? Was its performance a mat-
" ter of indifference so far as that com-
" merce was concerned, or was it in the
" nature of a duty resting upon the car-
" rier? That answers are obvious. Tracks
" and bridges are as indispensable to in-
" terstate commerce by railroad as are
" engines and cars, and sound economic
" reasons unite with settled rules of law
" in demanding that all of these instru-
" mentalities be kept in repair. The se-
" surity, expedition and efficiency of the
" commerce depends in large measure
" upon this being done. Indeed, the stat-
" ute now before us proceeds upon the
" theory that the carrier is charged with
" the duty of exercising appropriate care
" to prevent or correct ' any defect or in-
" ' sufficiency . . . in its cars, en-
" ' gines, appliances, machinery, track,
" ' roadbed, works, boats, wharves, or

"'other equipment' used in interstate "commerce. But independently of the "statute, we are of opinion that the work "of keeping such instrumentalities in a "proper state of repair while thus used "is so closely related to such commerce as "to be in practice and in legal contem- "plation a part of it. The contention to "the contrary proceeds upon the as- "sumption that interstate commerce by "railroad can be separated into its sev- "eral elements and the nature of each de- "termined regardless of its relation to "others or to the business as a whole. "But this is an erroneous assumption. "The true test always is: Is the work "in question a part of the interstate com- "merce in which the carrier is engaged?

* * * * * * *

"The point is made that the plaintiff "was not at the time of his injury en- "gaged in removing the old girder and "inserting the new one, but was merely "carrying to the place where that work "was to be done some of the materials to "be used therein. We think there is no "merit in this. It was necessary to the "repair of the bridge that the materials "be at hand, and the act of taking them

> " there was a part of that work. In other
> " words, it was a minor task which was
> " essentially a part of the larger one, as
> " is the case when an engineer takes his
> " engine from the roundhouse to the
> " track on which are the cars he is to haul
> " in interstate commerce."

How like in principle unto the case at bar is this recent and controlling decision? The analogy seems almost too clear for argument. In that case, as in the case at bar, the only question which engaged the attention of this court concerned the precise legal status of the work in which plaintiff was engaged at the time of his injury; there, as here, he invoked the benefits of the Federal statute, contending that he was employed in interstate commerce within the meaning of its terms, although he was not directly engaged in the movement of any train or locomotive or similar device. There the plaintiff was carrying bolts or rivets which were to be used at some later time in the repair of a bridge which was used for both interstate and intrastate traffic, and these repairs were to consist in the taking out of an old girder and replacing it with a new one. Here the plaintiff was engaged in the readjustment and repair of a machine, in

a repair shop devoted in part at least to interstate commerce, and the machine was used almost exclusively in the work of making necessary and hurried repairs to interstate locomotives. In the Pedersen case, this court deliberately held that the mere act of a common laborer in carrying a bolt which was necessary to the repair of a bridge, was part of interstate commerce; because the bridge was an instrumentality of such commerce, and the work of keeping it in a proper state of repair was " so closely related to interstate commerce as to be a part of it"; a decision which was based upon the logical argument that tracks and bridges are indispensable to interstate commerce and the statute has proceeded upon the theory that it is of vital importance to the public, and therefore the duty of the carrier, to keep not only its cars and engines, **but also its other machinery and appliances and equipment,** used in connection with its interstate commerce, free from all defects and imperfections. As the result of all this, the learned justice fixed this test, which has been so often applied and cited with approval, and which, as Judge Seabury observed in his dissenting opinion in the court below, possesses at least the merit of definiteness:

"Was that work being done independ-
"ently of the interstate commerce in
"which the defendant was engaged, or
"was it so closely connected therewith
"as to be a part of it? Was its perform-
"ance a matter of indifference so far as
"that commerce was concerned, or was
"it in the nature of a duty resting upon
"the carrier?"

Tested by this standard, we submit, as was observed by Mr. Justice Kelly of New York Supreme Court, that this plaintiff's case is stronger even than was the Pedersen case; for if the act of a common laborer in carrying a bolt, with which to fix a girder, which girder is to be replaced upon a bridge used indiscrimnately for both interstate and intrastate commerce, is "so closely connected with interstate commerce as to be a part of it"; if this act is "not a matter of indifference so far as that commerce is concerned"; then more clearly and definitely must the same thing be true of the act of the plaintiff in the case at bar, who was readjusting and repairing the countershaft of a shaping machine, without the continued use of which, it is practically conceded in the record, not a single cotter-pin or key could be

repaired or supplied to the damaged locomotives of this vast railway system in all the state of New Jersey; and all the rush work, which included the hurried repairs to interstate locomotives, must be at a standstill.

Again, if it be true that tracks and bridges "are as indispensable to interstate commerce as engines and cars," then why is not this one shaping machine, operated by this one man, the **only forces of their kind in all that great state**—likewise "as indispensable to interstate commerce" as engines, or cars, or tracks, or bridges? The answer to this is well stated in Judge Seabury's dissenting opinion in the court below, who expresses the thought in these words at page 148 of the record:

> "The claim is made that the plaintiff "was not at the time of the accident en- "gaged in interstate commerce. If the "plaintiff had been engaged at the time "of the accident in working upon a loco- "motive engaged in interstate com- "merce, it is conceded that he would be "within the Federal statute. Is he with- "out the protection of this statute be- "cause he was working to put in order a "machine that was to be used in repair-

" ing locomotives engaged in interstate
" commerce? In my opinion he was not.
" The work of repairing the shaping ma-
" chine was not independent of interstate
" commerce. It was essential to the
" carrying on of that commerce. The
" work of putting that machine in order
" so that it could be used in the repair of
" locomotives engaged in interstate com-
" merce, was just as much an act of inter-
" state commerce as if the work had been
" done upon such a locomotive. The
" work in which the plaintiff was en-
" gaged was, as the United States Su-
" preme Court said in the Pedersen case
" (229 U. S. 146) ' so closely related to
" ' such commerce as to be in practice and
" ' in legal contemplation a part of it.' "

* * * * * * * * *

**" This is a case where the plaintiff was
" injured while engaged in the perform-
" ance of an act necessary to maintaining
" in proper condition the shaping ma-
" chine which was as much an instrumen-
" tality of interstate commerce as are
" bolts used in the repair of a bridge.
" Without this machine the locomotives
" engaged in interstate commerce could
" not have been repaired and put in a con-**

> " dition to be used in such commerce. It
> " may have been minor work, but it was
> " none the less an essential part of the
> " larger work of putting in repair loco-
> " motives engaged in interstate com-
> " merce. The Pendersen case (supra)
> " seems to me to sustain the contention
> " of the plaintiff that at the time of the
> " accident he was engaged in interstate
> " commerce." (Italics ours.)

And the learned Trial Justice, along these same lines, makes this suggestion at fol. 347 of the record, in his opinion upon the denial of defendant's motion for a new trial:

> " The plaintiff's case is much stronger
> " in this regard than the cases cited. This
> " plaintiff was not working on tracks,
> " sidings, bridges or coal trestles, which
> " might be used for various kinds of
> " traffic, and in such cases it has been held
> " that the employee comes within the
> " protection of the act of Congress. He
> " was working on the locomotive engines
> " devoted exclusively to interstate traffic
> " —' rush work.' It seems to me that he
> " was almost in the same category as the
> " engineer and fireman."

That the test thus created by the Pedersen case has since commended itself to this court as a safe and sure guide, is exhibited by several later decisions of the same tribunal, among which may be mentioned St. Louis & San Francisco Ry. v. Seale (229 U. S. 159), and North Carolina v. Zachary (232 U. S. 248). In the first of these cases the question arose as to the legal status of a yard clerk whose principal duties were the examination, checking and labeling of ingoing and outgoing trains for the purpose of assortment and record. This work referred both to interstate and intrastate traffic. While on his way through the yard to meet an incoming freight for the purpose of checking it in the usual way, he was struck by another train. He invoked the benefits of the Federal statute, contending that he was at the time employed in interstate commerce, within the terms of the act; and this court declared that there was no question of the soundness of his contention. And although the opinion is not lengthy, it is probable that the case was decided upon the same considerations as those which influenced this court in the Pedersen case, because the decision immediately follows the Pedersen case in the same bound volume of the Supreme Court Reports.

In the Zachary case (232 U. S. 248), plaintiff's intestate was killed while attempting to cross certain tracks in a railroad yard, **being at the precise moment of his injury walking toward his boarding house and doing absolutely nothing in reference to the trains or traffic.** In view of the fact, however, that he was generally engaged in interstate commerce and had just finished oiling and repairing his locomotive for its trip, this court declared that he was within the protection of the Federal statute and entitled to all its privileges and immunities. The decision is based upon the ruling in the Pedersen case, which is cited with approval; and this portion of the opinion commends itself as a logical step in the argument which we are now seeking to present:

> "It is argued that because, so far as
> "appears, deceased had not previously
> "participated in any movement of inter-
> "state freight, and the through cars had
> "not as yet been attached to his engine,
> "his employment in interstate com-
> "merce was still **in future.** It seems to
> "us, however, that his acts in inspecting,
> "oiling, firing, and preparing his engine
> "for the trip to Selma were acts per-

"formed as a part of interstate com-
"merce, and the circumstance that the
"interstate freight cars had not as yet
"been coupled up is legally insignificant.
"See Pedersen v. Del. Lack. & Western
"R. Co., 229 U. S. 146, 151; St. Louis &
"San Francisco Ry. v. Seale, 229 U. S.
"156, 161."

Nor were any of these propositions of law at all new or startling. On the contrary, they logically and naturally followed as the result of the very exhaustive opinion written by this court in those cases known as the Second Employers' Liability Cases (223 U. S. 1), in which Mr. Justice Van Devanter had gone to the very root of the question in considering the constitutionality of the statute. In that opinion the general intent and spirit of the Federal Act of 1908, as amended in 1910, was considered and discussed at length, and the power of Congress upon the subject defined and illustrated. In the course of his argument the learned Justice declared that among certain propositions now so firmly established as to admit of no doubt or question, are these:

"4. This power over commerce among
"the states, so conferred upon Congress,

"is complete in itself, extends incident-
"ally to every instrument and agent by
"which such commerce is carried on,
"may be exerted to its utmost extent
"over every part of such commerce, and
"is subject to no limitations save such as
"are prescribed in the Constitution. But,
"of course, it does not extend to any mat-
"ter or thing which does not have a real
"or substantial relation to some part of
"such commerce.

"5. Among the instruments and
"agents to which the power extends are
"the railroads over which transportation
"from one state to another is conducted,
"the engines and cars by which such
"transportation is effected, and all who
"are in anywise engaged in such trans-
"portation, whether as common carriers
"or as their employees."

And while perhaps we ought not to burden the pages of this brief with the too frequent quotation of judicial expression, yet that portion of the brief of the Solicitor General which so commended itself to the court as to be adopted and approved as part of its opinion (223 U. S. 48), likewise appeals to us as of such pertinent significance as to warrant its repetition here:

"Interstate commerce—if not always,
"at any rate when the commerce is trans-
"portation—is an act. Congress, of
"course, can do anything which, in the
"exercise by itself of a fair discretion,
"may be deemed appropriate to save the
"act of interstate commerce from pre-
"vention or interruption, or to make that
"act more secure, more reliable or more
"efficient. The act of interstate com-
"merce is done by the labor of men and
"with the help of things; and these men
"and things are the agents and instru-
"ments of the commerce. If the agents
"or instruments are destroyed while
"they are doing the act, commerce is
"stopped; if the agents or instruments
"are interrupted, commerce is interrupt-
"ed; if the agents or instruments are not
"of the right kind or quality, commerce
"in consequence becomes slow or costly
"or unsafe or otherwise inefficient; and
"if the conditions under which the
"agents or instruments do the work of
"commerce are wrong or disadvantage-
"ous, those bad conditions may and often
"will prevent or interrupt the act of
"commerce or make it less expeditious,
"less reliable, less economical and less

"secure. **Therefore, Congress must leg-**
"islate about the agents and instruments
"of interstate commerce, and about the
"conditions under which those agents
"and instruments perform the work of
"interstate commerce, whenever such
"legislation bears, or in the exercise of a
"fair legislative discretion can be
"deemed to bear, upon the reliability or
"promptness or economy or security or
"utility of the interstate commerce act."
(Italics ours.)

We pause here to observe that if the reasoning of the learned Solicitor General, in his brief in the Second Employers' Liability Cases, was so sound as to commend itself to the court, there can be no doubt of the result of the present controversy; for it fixes the status of the shaping machine and countershaft, which are the subject of discussion here, as instrumentalities and agents of interstate commerce, perhaps more clearly than could any other words or phrases.

The Second Employers' Liability Cases dealt with several controversies which had arisen under the statute. In one of these, in which the judgment was affirmed, the declar-

ation showed that the deceased was engaged at the time of his injury in replacing a drawbar on one of defendant's cars, then in use in interstate commerce. Apparently he was not a member of any train crew, but only a machinist, whose duty it was to make such repairs in a yard or on a switch.

At this point of the discussion, and as part of the consideration of the Pedersen case, it is proper to note a very learned decision of the Circuit Court of Appeals of Oregon, which is cited with approval by Mr. Justice Van Devanter in his decision in the Pedersen case. We refer to Lamphere v. Oregon Rd. & Nav. Co. (196 Fed. Rep. 336-340). The case was decided in view of the previous ruling of this court in the Second Employers' Liability Cases, after an exhaustive discussion of which the learned jurist who wrote for the Circuit Court of Appeals concludes thus:

> " As indicated in the opinion, the test " question in determining whether a per- " sonal injury to an employee of a rail- " road company is within the purview of " the act is, ' **What is its effect upon in-** " ' **terstate commerce? Does it have the** " ' **effect to hinder, delay, or interfere**

> "**with such commerce?** As applied to "the present case, it is this: Was the re- "lation of the employment of the de- "ceased to interstate commerce such that "the personal injury to him tended to "delay or hinder the movement of a train "engaged in interstate commerce?" (Italics ours.)

Having in mind that this decision in the Lamphere case met the express approval of this court in Pedersen's case, it is fair to assume that it was considered a correct interpretation of the statute; and indeed the test applied in the Lamphere case is but the statement in another form of the standard fixed by the Pedersen case. Let us then apply the test of the Lamphere case, as we have heretofore applied that of the Pedersen case. What was the effect of the act of the plaintiff-in-error, in the work he was doing at the time of his injury, so far as interstate commerce was concerned? Would any injury to him have the effect to hinder, delay or impede that commerce? The answer to each of these questions is self-evident. The injury to the plaintiff in the case at bar had the undoubted effect of stopping all work upon his shaping machine until a man had been substituted in his

place and stead to complete the repair and readjustment of the countershaft. Until this was done the machine could not be used; and even after this was done, the machine could not be used until another man had been substituted in plaintiff's stead to run the machine; and until such substitution and completion not a single bit of the rush work could be done, and all interstate locomotives on the road needing a new pin or key or bushing, must stand idle. For it may properly be repeated, time and time again, that this was the only man, and the only machine, in the only shop in the state of New Jersey, by whom, and by the use of which, repairs to interstate locomotives could be made. Who shall have the temerity to seriously argue that there was no real and substantial relation between the work of the plaintiff and the interstate commerce of this road? Certainly it cannot be so argued upon any fair interpretation of any of the leading cases to which we have called attention.

Among other cases cited and approved in the Pedersen decision are to be mentioned the following:

Northern Pacific v. Maerkl, 119 Fed. Rep. 1, held that a person working in repair shops

connected with an interstate track, and engaged in the repair of a car used both in interstate and intrastate traffic, was engaged in interstate commerce within the meaning of the statute.

Central R. R. Co. of New Jersey v. Colasurdo, 192 Fed. Rep. 901, was a case of a track repairer who was directed to repair a switch in a terminal late at night, and who was struck and injured by unlighted cars being negligently "kicked" back. The facts are not similar to those existing in the case at bar, but the language of the court is important to the present argument, because it was approved and sanctioned in the Pedersen case, and because it had in turn affirmed a decision in Central R. R. v. Colasurdo, 180 Fed. Rep. 382. In the latter report is to be found the opinion of Judge Hand, to a portion of which we now especially invite the attention of the court:

> "The remaining question is of the ap-
> "plication of the act of 1908, and that
> "turns on whether the plaintiff was em-
> "ployed in interstate commerce. The
> "act in question was passed after the de-
> "cision of the Supreme Court in the Em-

"ployers' Liability Cases, 207 U. S. 463,
"28 sup. Ct. 141, 52 L. Ed. 297, in which
"a similar act was declared unconstitu-
"tional by a divided court, because it
"applied generally to all carriers en-
"gaged in interstate commerce, regard-
"less of whether or not the particular
"act was in interstate commerce. Some
"questions, however, were decided by
"the whole court in those cases, and one
"of these was that the act was not un-
"constitutional because it regulated the
"relation of master and servant; all the
"justices recognizing that Congress
"might regulate those relations while
"the master and servant were employed
"in interstate commerce. The present
"act was clearly passed to meet the ob-
"jection of that decision, and I think it
"should therefore be construed as in-
"tending to include within the term
"'person employed in such commerce'
"all those persons who could be so in-
"cluded within the constitutional power
"of Congress; **that is to say, the act**
"meant to include everybody whom Con-
"gress could include." (Italics ours.)

This last observation of Judge Hand's has been often made in cases concerning the proper construction of the statute. It was indicated in the opinion of Mr. Justice Van Devanter, in the Second Employers' Liability Cases; and it was repeated in Horton v. Oregon R. R., 72 Wash. 503 (47 L. R. A., N. S., 8), a case in which an operator of a railroad pumping plant, which furnished water to interstate and cross-state trains, was held to be employed in interstate commerce **while riding from his home to his work on a hand car furnished by the company.** The opinion reads in part:

> "The sole question presented for our "consideration is this: Was the de- "cedent employed by the defendant in "interstate commerce at the time of his "death, so as to enable his representa- "tive to invoke the benefit of this act? "The earlier act of 1906 (act June 11, "1906, chap. 3073, 34 Stat. at L. 232, U. S. "Comp. State. Supp. 1911, p. 1316, was "in the Employers' Liability Cases "(Howard v. Illinois C. R. Co.) 207 U. S. "463, 52 L. Ed. 297, 28 Sup. Ct. Rep. 141, "held unconstitutional as exceeding the "power of Congress under the commerce

"clause of the Constitution, in that it "imposed a liability, as against all com- "mon carriers engaged in interstate "commerce, in favor of any of their em- "ployees without restriction, and "whether their employment did or did "not pertain to intestate commerce. In "those cases, however, all the justices "concurred in recognizing the power of "Congress to regulate the relation of "master and servant by regulations con- "fined to interstate commerce and serv- "ices connected therewith. The act of "1908 above quoted, was passed to con- "form to that decision, and should there- "fore be construed as including within "the term, 'any person suffering injury "while he is employed by such carrier in "'such commerce,' every person who "could be so included within the pur- "view of the constitutional power. 'The "act meant to include everybody whom "'Congress could include.' Colasurdo "v. Central R. Co. (C. C.) 180 Fed. 832. "That such was the purpose and intent "of the second act seems to be assumed "by the Supreme Court of the United "States in an opinion holding the act "constitutional. Second Employers'

"Liability Cases (Mondou v. New York,
"N. H. & H. R. Co.) 223 U. S. 1, 56 L. Ed.
"327, 38 L. R. A. (N. S.) 44, 32 Sup. Ct.
"Rep. 169, 1 N. C. C. A. 875. The inquiry
"is thus narrowed to the concrete ques-
"tion: **Had Congress the constitutional**
"power to enact a law regulating the
"relation between a common carrier en-
"gaged in interstate commerce and its
"servant who is employed in pumping
"water used by its engines both for inter-
...."**state and intrastate commerce? If Con-**
"gress had this power, then we must as-
"sume that it intended to exercise it in
"passing the present act." (Italics ours.)

After which the court states this rule as the test:

"Was the relation of his employment
"to interstate commerce such that an in-
"jury to him tended to delay or hinder
"the movement of trains engaged in
"such commerce? There is but one
"answer to the question. Water to sup-
"ply the engines pulling such trains had
"to be pumped as a necessary incident
"to the movement of trains. If, when he

" was killed, his place had not been sup-
" plied by another, the movement of
" trains engaged in interstate commerce
" conducted by the master as well as the
" local trains, must have ceased alto-
" gether. This demonstrates the ' real or
" substantial' connection of his employ-
" ment with such commerce. There can
" be no possible distinction in the relation
" to interstate commerce between the
" employment of the fireman who stokes
" the engine hauling the train so engaged
" and that of the man who pumps the
" water for the same engine."

This suggestion as to the power of Congress and its probable intent seems to be borne out by the use of the words " equipment", " appliances ", " machinery " in the statute. For while some of the courts have sought to limit the benefits of the statute to those employed directly in the movement of trains, such as locomotive engineers, brakeman, and the like, still the fair reading of the statute, wherein other terms like " equipment ", " appliance " and " machinery " are used, taken in connection with the proposition that Congress intended to include all classes of persons, whom it could include, must result in that broad and

liberal construction contended for here. Once concede that Congress intended to include within the statute all persons who could be included, then must it also be conceded that the plaintiff in the case at bar was so included; for he was certainly an agent working upon one of the instrumentalities of interstate commerce, as those terms were amplified and discussed in that portion of the opinion in the Second Employers' Liability Cases, which quotes from the brief of the Solicitor General.

Passing now to some of the later cases in which the decision in the Pedersen case has been so often mentioned and approved as the true test,

Law v. Illinois Central R. R. Co., 208 Fed. Rep., 869, is a fair illustration of these. In that case the plaintiff was a boiler maker's helper employed in a repair shop at Memphis, Tenn. He was helping the boiler maker repair the " petticoat " of a freight engine regularly employed in interstate commerce; **but the engine had been dismantled for at least twenty-one days before the accident, and was in the shop being repaired.** While fastening two sheet-iron plates together the plaintiff was injured by the negligence of the boiler maker, who struck a glancing blow, causing a

nut to fly off and strike him in the eye. The court, invoking the rule of the Pedersen case, states this:

> "As held in the Pedersen case, the "work of keeping the instrumentalities "used in interstate commerce (which "would include engines) in a proper "state of repair while thus used is 'so "'clearly related to such commerce as to "'be in practice and in legal contempla- "'tion a part of it.'"

It is fair to observe, in connection with the case last cited, that if there is any real or substantantial relation between interstate commerce and the repair of an engine which has been dismantled for twenty-one days,—one single engine out of all the hundreds or thousands available,—then how much more close and real, and direct and pertinent, must be the connection between such commerce and the shaping machine in the case at bar, upon which all of the locomotives depended, to some extent at least, every hour of every day in the year?

We like very much the reasoning of the District Court of Oregon in Eng. v. Southern Pacific, 210 Fed. Rep. 92, where the test of the

Pedersen case was applied to a state of facts almost, if not quite, upon the border line. In that case the plaintiff was sawing boards and nailing them upon the wall of a new office in a freight shed used both in interstate and intrastate commerce. He was injured while doing that work, and contending that he was employed in interstate commerce within the meaning of the statute, he invoked its benefits and predicated his action thereon. In sustaining his contention the learned court says:

> " When a carrier is engaged in both in-
> " trastate and interstate commerce, us-
> " ing the same instrumentalities, appli-
> " ances, and employes in both classes of
> " commerce, it is difficult to draw the
> " line of demarkation between the two
> " classes of employment; but the result
> " of the decisions up to this time seems
> " to be that, when the work in which the
> " employe was engaged at the time of his
> " injury is so closely connected with in-
> " terstate commerce as to be a part there-
> " of, it comes within the statute. It has
> " been so held in the case of persons en-
> " gaged in repairing tracks, bridges and
> " cars used in both state and interstate
> " commerce. (Pederson v. D. L. & W. Ry.

" Co., 229 U. S. 146, 33 Sup. Ct. 648, 57
" L. Ed. 1125, decided by the Supreme
" Court May 26, 1913; Zikos v. Oregon R.
" & Navigation Co. (C. C.) 179 Fed. 893;
" Northern Pac. Ry. Co. v. Maerkl, 198
" Fed. 1, 117 C. C. A. 237; Stafford v. Nor-
" folk & W. Ry. Co. (D. C.) 202 Fed. 605),
" and in coupling cars so used while
" standing on a switch (Johnston v. Great
" Northern Ry. Co., 178 Fed. 643, 102
" C. C. A. 89).

" **The principle seems to be that one**
" **employed at the time of his injury in**
" **the use of or maintaining in proper con-**
" **dition any instrumantality or appliance**
" **used by the carrier in interstate com-**
" **merce comes within the statute, al-**
" **though such instrumentality or appli-**
" **ance may also be used for intrastate**
" **business. Now, freight sheds, depots**
" **and warehouses or other facilities pro-**
" **vided and used by a carrier for receiv-**
" **ing, handling, and discharging inter-**
" **state freight are, I take it, instrumen-**
" **talities used in interstate commerce**
" **under the doctrine of the cases, and are**
" **so closely connected therewith as to be**
" **a part thereof for the purposes of the**
" **Federal Employers' Liability Act."**
(Italics ours.)

In consideration of the case last cited, we assert, with all confidence, that if that decision is right, and it surely seems to be right in principle, then there is something radically wrong with the decision of the Court of Appeals of New York State in the present controversy. For if, under any construction of the Pedersen case, it can fairly be held that a man nailing boards to the wall of a freight shed is engaged in interstate commerce, then much more sure and certain is the proposition that the plaintiff-in-error in the case at bar was likewise so employed, when repairing and readjusting this shaping machine which bore such close relation to the traffic of the road.

Another case far weaker in its facts than the present controversy, but nevertheless decided in favor of plaintiff's contention that his action was properly brought under the Federal statute, is Thomas v. B. & M. R. R., 219 Fed. Rep., 180, in which the opinion was written by the Circuit Court of Appeals of New Hampshire. There the plaintiff was engaged in tearing down a portion of a roundhouse, which had been rendered useless by fire, although it had previously been used for the housing of engines used by the defendant

in interstate commerce. The court, basing its decision upon Pedersen v. D. L. & W., declared that the plaintiff was engaged in interstate commerce at the time of his injury, because he was **"repairing an instrumentality" of such commerce.**

Here, again, we cannot refrain from pausing to observe that if there be any real or substantial connection between the movement of interstate trains and the tearing down of a portion of a roundhouse, then certainly there must be a more direct and real connection disclosed by the facts of the case at bar.

Note also Illinois Central v. Nelson, 203 Fed. Rep., 956, where a brakeman was injured while crossing the tracks carrying ice to be used in cooling hot boxes. It was held that his work and his act at the precise time of injury were so closely related to interstate commerce as to be a part of it, and that he was within the Federal Statute. But why is this so, if not for the reason that an engine cannot run safely with a hotbox, and must therefore be cooled off? And if this be the reason, then must it be suggested again that an engine cannot run without keys and cot-

ters and bushings, and when these are out of repair they must be furnished just as quickly and as surely, as ice to cool the hot-box.

A very interesting case, well reasoned in its logic and learned in its utterance, is Montgomery v. Southern Pacific Co., 64 Oreg., 597, (47 L. R. A., N. S., 13-17), in which a member of a switching crew was injured while attempting to move on a switch a tank car loaded with oil for locomotives. He was held to be engaged in interstate commerce, in an opinion which reads in part as follows:

> " Was not the act which plaintiff was
> " performing at the time of the accident
> " just as essential to interstate com-
> " merce as the repairing or the pulling
> " of the throttle of an engine used in
> " such traffic? It was a necessary act in
> " the transmission of interstate freight,
> " and all who co-operated in the work
> " were engaged in interstate commerce,
> " within the meaning of the act of Con-
> " gress. It was closely connected with
> " his general duties. Oil is the food that
> " gives life and strength to the engine,
> " furnishing the motive power for the

"transportation of interstate freight,
"and by the aid of which a stream of
"commerce flows from state to state
"and from state to foreign nations.
"To illustrate: Draw a line to rep-
"sent the boundary between two
"states; draw another line cross-
"ing the first, to represent the
"stream of interstate commerce. What-
"ever act in a substantial manner aids,
"accelerates, or increases the amount of,
"or furnishes a part of the supply for,
"such stream, and is connected there-
"with, to the same extent may be said to
"aid, support and maintain the act of
"interstate commerce. Such labor
"makes interstate commerce more se-
"cure, more reliable, and more effec-
"tive. **Suppose that all the agents en-**
"gaged in providing oil to be used as
"fuel in interstate commerce upon a
"railroad, as this oil was destined to be
"used, should cease to act, for instance,
"on account of a boycott, or by reason of
"an injunction order issued by a state
"court for some purpose conceived to be
"a good (a violent assumption), and
"there were a failure of the supply of
"fuel, and both the switch and interstate
"engines were compelled to stop, the

> **" stream of interstate commerce would " also stop or be lessened to the same ex- " tent. What court or lawyer would say " that under these circumstances there " was not a substantial interference with " interstate commerce?"** (Italics ours.)

And this was said in answer to the question which the court had framed at page 16 as the test laid down by the various decisions of this court in these words:

> " Did the work in which the plaintiff " and his associates were engaged at the " time of the injury have a real or sub- " stantial connection with interstate " commerce so as to bring plaintiff with- " in the protection of the act?"

To paraphrase the latter portion of this quotation:—suppose that all of the agents engaged by the D. L. & W. R. R. Co., in making repairs to interstate locomotives (in this case only one such agent and one machine), should for any reason cease to act; and there were a complete failure of such repairs, and all such interstate engines as might be out of repair stood idle, " what court or lawyer would say that under these circumstances

there was not a substantial interference with interstate commerce?"

The reasoning of the case last cited is very similar to that upon which this court proceeds in Louisville & Nashville R. R. v. Melton, (218 U. S., 36-48). That case is not directly in point, because it deals with a state rather than with the Federal statute; but a portion of the opinion of Mr. Justice White very plainly presents the suggestion which we are now seeking to fix in the mind of the court. We therefore quote briefly:

> " A railroad cannot be run without
> " bridges; bridges cannot be built with-
> " out carpenters. The work of a bridge
> " carpenter on a railroad is perhaps no
> " less perilous than the work of an op-
> " erative on one of its trains. Coal tip-
> " ples are no less essential to the opera-
> " tion of a railroad than bridges, because
> " the engines cannot be operated with-
> " out coal. The construction of a coal
> " tipple is therefore essential to the op-
> " erating of a railroad."

To adopt and apply these suggestions to the case at bar, may be some aid to the argu-

ment. As a railroad cannot be run without bridges, and as bridges cannot be built without carpenters, it is likewise true that a railroad cannot be run without repairs, and repairs cannot be made without machines and machinists. And as the work of a bridge carpenter is perhaps no less perilous than the work of an operative upon a running train, neither is the work of a machinist in a repair shop any less perilous at certain services. Nor is a coal tipple in certain respects any more essential to the operation of a railroad, because engines cannot be operated without coal, than is a repairing machine of the character involved in this case; because those repairs are precisely as essential and necessary to the movement of the locomotive as the coal with which its steam is produced. This we think is a logical and fair argument.

Perhaps the furthest extreme to which the ruling had been carried is illustrated by Cousins v. Illinois Central, 126 Minn., 172, in which an employee engaged in wheeling coal to be used as fuel in a shop in which other employees were engaged in repairing cars used in interstate commerce, was held to be within the protection of the statute. This case is mentioned with a number of other

very recent decisions in 55 L. R. A. (N. S.), page 60.

But perhaps we have now approached the point where the further citation and discussion of case law might weary the judicial mind. There are other cases which are important and ought to be discussed, but enough have been collated here to illustrate the general rules and principles for which we contend. Among the others which may be mentioned by name in passing are:

Darr v. Baltimore & Ohio, 197 Fed. Rep., 665;
Thomson v. Columbia R. R. Co., 205 Fed. Rep., 203;
Johnson v. Great Northern R. R. Co., 178 Fed. Rep., 643;
Zikos v. Oregon Nav. Co., 179 Fed. Rep., 897.

As we close the discussion of this case law, in its application to the facts of the case at bar, it is a matter of some interest to note that many, if not all of these decisions, are to be found classified at length in several recent text books upon the subject, prepared by distinguished lawyers, for the use of the bench

and bar of the land. In those works the rule of these cases is stated and discussed as the law, thus according to them whatever of dignity such a legal certificate of character may imply. Among such recent text-books the work prepared by Mr. Maurice G. Roberts, a distinguished member of the Missouri bar, and which came out as late as April of this year; also Thornton on the Federal Employers' Liability & Safety Appliance Acts, Second Edition; and Doherty's Work on the Liability of Railroads to Interstate Employees, are to be noted.

Such is the law of this case, as it has been thus many times stated and repeated in the most solemn and decisive manner; and not a single controlling decision can be found in the books which, when properly interpreted, holds a single word to the contrary. It seems remarkable then that the plaintiff has not prevailed in the New York State courts, and the only possible explanation of his failure lies in the fact that over against these many authorities there has been placed the recent decision of this court in Illinois Central v. Behrens, 233 U. S., 473, which has erroneously been considered either as bearing a more close analogy to the case at bar than the

other decisions cited; or, if not that, as in some wise limiting or modifying the doctrine of those other cases. It is necessary then to discuss that Behrens case at some length; but before doing so, it is proper to observe that it seems impossible to conceive that Mr. Justice Van Devanter, who wrote so deliberately and carefully in the Pedersen case, would, almost in the next breath, retract the force and effect of his decision, and weaken and destroy the test of liability which he had so carefully framed. That he did not intend to do so is conceded even by the court from which this writ is taken; for the New York Court of Appeals has recently said in Barlow v. Lehigh Valley R. R. Co., 214 N. Y., 116-120:

> " We do not construe the later decis-
> " ion (Behrens case) as in any way lim-
> " iting or modifying the rule of the
> " Pedersen case."

What then does the Behrens case hold, and what, if anything, is its legal effect upon the present controversy?

The very latest case to be found in the books, New York Central vs. Carr, 238 U. S., 260, approves and follows the rule of the Pedersen case and very carefully distinguishes the Behrens case, declaring that each case must be decided upon its own facts and in the light of the rule of the Pedersen case.

The Behrens case.

This case (Illinois Central v. Behrens, 233 U. S., 473), far from limiting or modifying the doctrine of the Pedersen case, expressly approved and ratified the rule therein stated, and when carefully read it will be found to contain not a single word or phrase to the contrary. In applying that rule, however, it held, and very properly and naturally held, that a person was not engaged in interstate commerce at the time of his injury, when it was conceded that at that time he was doing nothing which had or could have any real or substantial relation to interstate commerce, but was engaged rather **in moving cars all loaded with intrastate freight from one part of the city to the other.** This man did, it is true, expect to engage in another task which would have been part of interstate commerce, when he had completed the work he was then doing; but that is as close as he came to interstate commerce. To demonstrate this, it is only necessary to glance at the facts, which are detailed at page 476 of the opinion, as follows:

> " The intestate was in the service of
> " the railroad company as a member of
> " a crew attached to a switch engine **op-**

" **erated exclusively within the City of**
" **New Orleans.** He was the fireman, and
" came to his death, while at his post of
" duty, through a head-on collision. The
" general work of the crew consisted in
" moving cars from one point to another
" **within the city** over the company's
" tracks and other connecting tracks.
" Sometimes the cars were loaded, at
" other times empty, and at still other
" times some were loaded and others
" empty. When loaded the freight in
" them was at times destined from with-
" in to without the State or **vice versa,** at
" other times was moving only between
" points within the State, and at still
" other times was of both classes. When
" the cars were empty the purpose was
" usually to take them where they were
" to be loaded or away from where they
" had been unloaded. And oftentimes,
" following the movement of cars, loaded
" or empty, to a given point, other cars
" were gathered up and taken or started
" elsewhere. In short, the crew handled
" interstate and intrastate traffic indis-
" criminately, frequently moving both
" at once and at times turning directly
" from one to the other. At the time of

> " the collision the crew was moving sev-
> " eral cars loaded with freight which was
> " **wholly intrastate,** and upon complet-
> " ing that movement was to have gath-
> " ered up and taken to other points sev-
> " eral other cars as a step or link in their
> " transportation to various destinations
> " within and without the State."

Indeed, the New York Court of Appeals, in the Barlow case, thoroughly understood this distinction, as is indicated by the opinion of Judge Miller (Barlow v. Lehigh Valley, 214 N. Y., 120), where it is said:

> " The employee in that case (Behrens
> " case) **was concededly engaged at the**
> " **moment of his injury in intrastate com-**
> " **merce."**

The difficulty with the present situation is that the same court had not at that time thoroughly grasped this very important distinction. Therein lies the trouble and the only trouble; and therein lies the reason, and the only reason, for the plaintiff's failure in the case at bar. Indeed, the New York Court of Appeals has made the fatal mistake of applying to this statute the strictest possible construction, whereas it should have done

the exact contrary. For the canon of interpretation by which this act is to be construed has long been settled and is thoroughly understood, being perhaps best stated in the very late case of Thornton v. Kansas City R. R. Co., 91 Kans., 684, in these words:

> " To hold otherwise would be contrary
> " to the manifest purposes of the act,
> " which, as we have seen, has been gen-
> " erally construed, broadly and liberally,
> " as it should be, in the interest of hu-
> " manity and commerce alike."

We pass now to the conclusion of the argument, first, however, mentioning briefly one or two respects in which the State courts have fallen into serious error in their interpretation of the evidence.

Some erroneous impressions indicated by the opinions of the State courts.

The opinions of the New York State Appellate Division and Court of Appeals indicate, in several instances, an erroneous conception of the fact and law of the case, which calls for at least a very brief mention at this stage of the discussion.

In the first place, the New York Court of Appeals, while fully recognizing the rule of the Pedersen case, and quoting the same at length in its opinion, has still declined to follow and adopt that rule, criticising it as imperfect and inadequate. That this is the precise situation admits of no doubt whatever, for Judge Chase so asserts in his opinion, at pages 145-146 of the record, in these words:

> " It is of great importance to employ-
> " ers and employees that rules be estab-
> " lished by which it can be determined
> " with reasonable certainty whether a
> " person at a given time is engaged in in-
> " terstate or intrastate commerce. It
> " does not seem to us that each specific
> " act of employment by a carrier can be
> " satisfactorily defined and classified by
> " generally and unqualifiedly including
> " as a part of interstate commerce every
> " act of employment closely connected
> " therewith, and every act the perform-
> " ance of which is not a matter of indif-
> " ference in such commerce."

On the other hand, Judge Seabury of the same court, in reference to the rule of the

Pedersen case, says: "One of the chief merits of the construction put upon the statute by the United States Supreme Court is the clearness with which it defines the line or demarcation between what is and what is not within the Statute, and thus provides a definite test by which the person injured may determine whether his remedy is under the Federal statute or under the State law." (See page 150 of the Record.)

So it appears that the State Court of Appeals, with the rule of the Pedersen case firmly in mind, and conscious of the fact that that rule had been deliberately laid down by this court as the test of liability, has failed to follow that rule, criticising it as imperfect. If this be true, then we respectfully submit that it illustrates a remarkable departure from that settled principle which requires all subordinate tribunals to bow in deference to the solemn mandate of this court when pronounced upon such a Federal question as that which is involved here. In other words, we understand it to be the law that a rule deliberately framed by this court in the construction of a Federal statute cannot be annulled and held for naught by any State tribunal. But whether this is so or not, cer-

tain it is that, having expressly denied the value and adequacy of the rule of the Pedersen case, it is not to be wondered that the Court of Appeals of the State of New York failed to properly apply it.

In the second place, it appears that the New York Court of Appeals has in several instances misconceived the legal effect of the facts, and has at times predicated its conclusions upon false premises. As an illustration of this it will be noted that over and over again the court mentions the fact, that plaintiff, at the time of his injury, was working as a "**millwright**" or doing "**millwright work;**" as if the name of the work was significant; but in no case to be found in the books is any such distinction made. Always the test is, not the name, but rather the nature, of the work, in its relation to commerce. An engineer, operating his interstate engine, would be no less engaged in interstate commerce if he were known as a hostler or a groom or a pedler.

Again, it will be noted that the Court of Appeals concludes that the plaintiff was not engaged in repairing or removing the shaping machine, etc.; that his removal of the

shaft had no effect upon the machine, and its rearrangement was therefore remote from interstate commerce. But this conclusion entirely overlooks and holds for naught the indisputable proposition that the shaft was, in legal contemplation, a part of the machine, **or at least part of the same machinery,** furnishing as it did its very life-blood, and being the main artery which supplied the source of all its power and usefulness and strength; and until the work upon the countershaft was completed the machine must remain idle. To say that this shaft was no part of the machine, in this sense, is like contending that the tongue is no part of the wagon, the roof no part of the house, the handle no part of the pump, the piston-rod no part of the locomotive.

And as the Court of Appeals seems to have thus misconceived some of the essential facts and propositions of law involved in the case, so also did the Appellate Division, as is pointed out by Judge Seabury in his dissenting opinion, at page 148, as follows:

> " In the opinion below two suggestions
> " are made which seem to me to have no
> " importance in this case. One relates to

I note in a recent edition of the Law Journal the report of what is perhaps the latest case upon this general subject, decided in any of the Courts of this country. I refer to THOMPSON vs. CINCINNATI &C., 176 S. W. 1006, in which the Court of Appeals of Kentucky, in June of this year applies the doctrine of the Pederson case to a state of facts very similar in principle to those with which we are considering in the case at bar. Space does not permit a detailed analysis of this recent decision, but it is of more than passing interest to the discussion.

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"the fact that at the time of the accident
"the plaintiff was engaged in Sunday
"work, from which the inference is sug-
"gested that this was not the regular
"work of the plaintiff. The fact shown
"by the evidence is, that repair work in
"this shop was done on Sundays as well
"as on other days and the fact that the
"plaintiff was engaged in Sunday work
"injects no exceptional feature into the
"case. The other suggestion, made be-
"low, is that the shop in which plaintiff
"worked was also used as the repair shop
"of a railroad which had extensive local
"service in which the locomotives were
"used only in interstate commerce. It
"appears from the testimony that the
"'rush work' upon which plaintiff was
"engaged was generally done upon loco-
"matives used in interstate commerce
"and that this was the principle work of
"that shop."

But it will serve no useful purpose to further discuss these opinions. This court will no doubt read them with care and interest; and their shortcomings, if any there be, must become at once apparent. Suffice to say that this case has not been decided right,

either by the New York Appellate Division or Court of Appeals. We pass now to the conclusion.

In Conclusion.

Upon the proper consideration of the various matters of fact and law discussed in the foregoing brief, which has been intended to be as logical and concise as possible, but which nevertheless lacks the essential merit of brevity, it would seem that the following conclusions must inevitably follow:

First. In the act of 1906 Congress had undoubtedly intended to extend its protection to all classes of persons employed by interstate railroads whose work was of a hazardous nature; and when that act had been declared unconstitutional, because it included within its provisions classes of persons not engaged in interstate commerce, the amendment of 1908 was passed to meet the objection. It is therefore fair to assume that Congress intended to include in the later act all persons who could be so included without transcending the constitutional limitations by which its power had been defined and restricted.

Second. Congress had the undoubted power to include within the protection of the

statute all persons employed in interstate commerce; and a fair and liberal interpretation of those terms must include all persons engaged upon the instrumentalities of such commerce, which bear a direct and close relation to, and are among the agencies of it. It is then fair to assume that this plaintiff was intended to be so included; for the statute is to be " broadly and liberally construed in the interest of humanity and commerce alike."

Third. The general employment of the plaintiff was in interstate commerce, because it is unquestioned that his general and special work was known as "rush work," and applied practically exclusively to interstate locomotives, it being remembered that in the case of local trains out of repair extra locomotives were provided.

Fourth. The shaping machine and its counter-shaft were so closely connected with each other as to form, in legal contemplation, one machine or set of machinery. This machine was not only one of the instrumentalities of interstate commerce, but may also fairly be included within the terms " equipment," "appliances" and "machinery" as used in the statute.

Fifth. Under the rule of the Pedersen case, as so many times reiterated and ap-

proved, the plaintiff's work at the precise time of his injury was part of interstate commerce, because it bore a direct and substantial relation to the movement of trains, and was not a matter of indifference to that commerce. Especially is this true when it is remembered that this was the only machine of the kind in the State at which such repairs could be made, and the plaintiff was the only person engaged upon the work. Hence the interstate commerce depended upon this machine and upon this man in a direct and vital manner.

Sixth. The test of the Pedersen case, as observed by Judge Seabury in his dissenting opinion in the New York Court of Appeals, possesses the merit of definiteness; and it was a deliberate and positive test which this court framed in the most solemn manner, as a guide to the judicial conscience. In the case at bar, had this test been properly applied, the plaintiff must have succeeded; but the New York Court of Appeals not only failed to apply the test, but also in terms apparently criticised and condemned the rule of this court as inadequate and imperfect.

Seventh. As the result of the failure of the New York Court of Appeals to properly apply and interpret the statute, with the test

of the Pedersen case as its guide, the plaintiff-in-error has been denied the privileges and immunities of a statute of the United States, whose benefits he had specially invoked in his pleading. He is therefore entitled to have the adverse judgments of the New York Appellate Division and Court of Appeals reversed, and the judgment of the New York Supreme Court sustained and reinstated.

The writ of error is therefore well taken and should be sustained.

Dated, August 2, 1915.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES.

October Term, 1915.

No. 477.

BRUCE SHANKS,

Plaintiff-in-Error,

against

THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY,

Defendant-in-Error.

Brief of Defendant-in-Error.

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BRUCE SHANKS, Plaintiff-in-Error, *against* THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY, Defendant-in-Error.	No. 477.

Brief on Behalf of the Delaware, Lackawanna and Western Railroad Company.

This case comes to the Supreme Court of the United States upon a writ of error directed to the Supreme Court of the State of New York, to review a judgment of said State Court, entered in Kings County on the 9th day of April, 1915, upon the remittitur of the Court of Appeals handed down upon the affirmance of a judgment order of the Appellate Division of the Supreme Court which reversed a judgment in favor of the plaintiff-in-error (the plaintiff below), against the defendant-in-error (defendant below), entered in Kings County after the verdict of a jury, and reversed the order of the Trial Court denying defendant's motion to set aside said verdict and for

a new trial, etc., and directed final judgment dismissing plaintiff's complaint.

The Cause of Action.

This action was brought under the Federal Employers' Liability Act of April 22, 1908, to recover damages for personal injuries suffered by the plaintiff and alleged to have been caused by the negligence of the defendant while the plaintiff was in the employ of the defendant as a machinist at its general repair shops at Kingsland, New Jersey. The complaint alleges that the plaintiff was employed in interstate commerce and the defendant engaged in such interstate commerce when the injuries were sustained (fols. 17, 18).

The accident which caused plaintiff's injuries happened in the State of New Jersey, and the contract of employment between the plaintiff and defendant was made in said State (fols. 150-152). During the period of plaintiff's employment by the defendant and at the time of the accident certain laws were in force in New Jersey which are known as the "Workmen's Compensation Act" (Defendant's Exhibit 1). By the terms of this act the plaintiff had no cause of action against the defendant on account of his injuries, but was entitled to the compensation specified therein, regardless of questions of negligence and liability (fols. 279-283, 326, 152-154).

The defendant's answer admitted that it was engaged in interstate commerce (fol. 26), but denied that the plaintiff was so engaged at the time of receiving his injuries (fol. 28); and it pleaded the said "Workmen's Compensation Act" as a bar

to the action (fols. 32-34). It also pleaded in defense contributory negligence and assumption of risk on the part of the plaintiff (fols. 30-32).

Under the pleadings and the law it is conceded by all concerned that the plaintiff has no cause of action against the defendant at common law or by virtue of any State statute because of any negligence. In other words, if plaintiff failed to make out a cause of action under the Federal Employers' Liability Act, he must be relegated to his rights and remedy under the New Jersey Compensation Act (fols. 214-216).

The Trial Court held that the plaintiff was employed in interstate commerce; that the Federal statute applied; and submitted the case to the jury (fols. 231, 252). The jury rendered a verdict for the plaintiff (fols. 38-40), and upon motion (fols. 43-48), judgment was entered against the defendant accordingly (fols. 49-51). The Appellate Division reversed the judgment entered upon the verdict upon the ground that the Federal statute did not apply, because the plaintiff was not employed in interstate commerce at the time he received his injuries (see Opinions, pp. 121-127), and the Court of Appeals affirmed the judgment of the Appellate Division upon the same grounds (see Opinions, pp. 143-150). Judgment was entered accordingly in the Supreme Court upon the remittitur of the Court of Appeals (pp. 131, 132), and the writ of error herein is addressed to this judgment (pp. 135-137).

Question Raised by the Writ of Error.

Only one question is presented for review in this Court by the asignment of error and writ of

error herein: Was the plaintiff employed in interstate commerce when he received the injuries complained of (p. 135)?

The evidence in the case is substantially undisputed and consists solely of the testimony of the plaintiff on the trial. Certain witnesses called by the defendant contradicted the plaintiff in certain particulars not relevant to the nature of the employment, but no issue is made with the plaintiff's version of the different kinds of work at which he was from time to time employed during the period of his employment by the defendant and at the time when he sustained the injuries for which this action is brought. The defendant stipulated upon the trial, at the close of the case, that it did not care "to raise any issue of fact * * * in relation to Mr. Shank's work, what the work was and what he did; we are content to be bound by the plaintiff's own story of the work he was doing" (fol. 226). This is the stipulation or concession which misled the Trial Judge into supposing (as stated in his opinion) that the defendant had admitted that plaintiff was employed in interstate commerce at the time of the accident (fols. 343-345).

Statement of Facts.

The plaintiff was about forty years of age when he was hurt, and a machinist by trade. He was never married. He was born in Ireland and came to the United States in October, 1909. He arrived on Monday morning and on the next Friday went to work for a pump factory located at Harrison, near Newark, in the State of New Jersey. He continued to work there until February 29, 1910 (fols. 109, 110, 113).

On March 2, 1910, he was hired to work for the defendant railroad company in its machine shops at Kingsland, New Jersey. His employment in defendant's shops at Kingsland was continuous from March 2, 1910, until January 14, 1912, when he was injured (fols. 110, 112, 68).

The plaintiff was employed as a machinist and earned an average of $17 per week. On Saturday, January 13, 1912, he was asked by the foreman, Nelson, who had charge of millwright work, to report for extra work on Sunday morning, January 14, 1912 (fols. 68, 102, 107, 114). He appeared at the shops for such overtime work and was employed at it for about two and one-half hours when he was hurt (fols. 81, 128).

The Kingsland shops are owned and operated by the defendant as general repair shops for the repair of locomotives running on the Morris and Essex Division of the railroad company, which extends from Hoboken, New Jersey, to Washington, New Jersey, and Easton, Pennsylvania. It is the only shop maintained by the defendant in the State of New Jersey for repairing locomotives (fols. 105-106). Locomotives operated by the defendant both in interstate and intrastate commerce were repaired in these shops (fols. 64, 65).

The part of the shops in which plaintiff was employed was several hundred feet long (fol. 115), and approximately 80 feet wide (fols. 134, 168). Various machines and benches were set up and operated along one side of the shop (fols. 101, 134). A 15-ton electric crane was operated in the shop by its own motive power on two tracks, laid on steel girders extending the entire length of the shop. The bottoms of the girders were 18 feet above the floor of the shop (fols.

69-75, 115-120). One girder constituted part of the wall of the building, the other girder was supported by steel columns and was 53 feet distant from the wall girder and about 30 feet from the opposite wall along which the shop machines were arranged. The girder extending through the middle of the shop, at which plaintiff was working, was essentially a great I-beam, 24 inches high with a flat top or flange 15 inches wide and a flat bottom or flange 10½ inches wide (fols. 172, 173). All the floor space between the two girders could be reached by the block and fall of the crane which had lateral motion as well as the longitudinal motion of the crane (fols. 116-119). The axles of the crane were substantially 53 feet long (fol. 168), and the wheels ran on railroad tracks laid on the top of the girders. No part of the crane extended outside the girder on which plaintiff was working (fols. 131, 180, 181).

The crane was operated and controlled by one man from a box or cage suspended from the crane midway between the two girders (fols. 176-177). The cage had no lateral motion (fol. 169).

The plaintiff was engaged usually at "rush work," so-called, which consisted in repairing parts of locomotives engaged either in interstate or intrastate commerce. These parts were usually sent from Hoboken to the shops, repaired and sent back right away (fols. 65, 66, 67). But when there was no rush work plaintiff did millwright work, repairing machinery in the shop (fols. 67, 68, 154, 156). Rush work had precedence over millwright work and work on interstate locomotives took precedence over work on local engines (fols. 66, 68, 97, 98.)

On the day of the accident, however, the plaintiff was not employed at repair work, but was moving the countershaft connected with a shaping machine, which, when in operation, was used indifferently to repair parts of interstate or intrastate locomotives (fols. 66, 67, 78, 79). The countershaft carried the pulleys which drove the belt which operated the shaping machine (fols. 69, 101). The countershaft itself was suspended by two hangers and the hangers, in turn, were attached by bolts to the bottom plate of one of the girders upon which the traveling crane was operated (fols. 75, 76). This shaping machine was one of two such machines in the shop (fols. 78, 79).

The plaintiff's employment during the whole day on which the accident occurred was solely the removal and re-attachment of these hangers and this countershaft. At the time of sustaining his injuries the nature of plaintiff's employment is best told in his own words:

> "Q. And you were just going to move that machine were you? A. No, I had taken down the countershaft, left it on the floor, and measured out where it was to go in to suit the drive. Then I got up, laid the holes for one hanger off, fastened same to place. Found when I came to apply the second hanger that the holes would come in between the two girders" (i. e., where two ends of the girder rested on top of the steel columns, fol. 128) "which was a space of half an inch, therefore the hanger could not be applied. I then stepped on the rail of the girder, on the edge of the girder, to see if you could fix it from the other side, but before doing that I looked along the rail and saw the crane was stationary. I then turned around to my helper and asked him to hand me up the lath

on which I had the distance marked where the hanger was to be applied" (fol. 79).

Shank's had no other work to do and did no other work on that day (fols. 69, 74, 75, 81, 97, 98, 114, 120, 128). The last work plaintiff had done on parts of locomotives was the day before the accident (fol. 98).

There were two distinct classes of work done in these shops, repair work and millright work. Each class of work constituted a separate department. The repair work was under foreman Bohler; the millwright work was done under foreman Nelson (fols. 102-105).

Plaintiff had been employed indifferently at both classes of work (fols. 97-99, 107, 154, 155).

So far the statement of facts has been directed especially to the nature of plaintiff's employment; the circumstances surrounding his injury are as follows:

In order to take down the countershaft and detach the shaft hangers, the plaintiff was provided with two horses, each about 15½ to 16 feet high, with platforms 4 x 6 feet on top, one of which he used as a scaffold (fols. 120, 177-179). These horses were placed under the girder and plaintiff was working on the outside; that is, he was not working between the girders in the path of the crane. All of his work was on the bottom flange of the girder (fols. 130, 141, 142, 183). He had no work to do at the top of the girder (fols. 122, 124, 130, 141, 142, 183, 184).

He was boring holes up through the bottom flange of the girder, one of which came through or would come through on the other side of the vertical plate of the girder (fols. 80, 127). He could

not see where this hole was coming through without placing himself (or his head at least), on the opposite side of the girder (fols. 131, 132). He could have gone under the girder where there was a space of from fourteen to eighteen inches (fols. 85, 178) between the top of his horse or scaffold and the bottom of the girder and seen the work, but he chose to step on the bottom flange, seize the top flange, draw himself up and over the top of the girder and rest upon the track on which the crane ran, and look over the girder, thereby unnecessarily exposing himself to injuries by the crane (fols. 126, 132). Before stepping on the girder plaintiff looked and saw that the crane was stationary (fols. 80, 83).

As he held himself in the position just described and was looking over the top of the girder and down at the point in the bottom flange of the girder where the holes were being bored, the crane moved and the wheels which ran upon the track to which plaintiff was clinging passed over his hands and caused the injuries described in the complaint.

The manner in which the crane was operated was known to the plaintiff. He had worked in the shop upwards of a year and ten months and knew that there was no signalling or warning device on the crane or used in connection with it. He knew that whenever any one wanted the crane, the operator was signaled to or called by voice and the crane was moved up and down the shop (fols. 72-74, 81, 82, 137-140, 197, 198). The only danger to be anticipated or guarded against in the operation of the crane was the danger of striking a workman on the floor with the load which the

crane might be moving. There was no danger to be apprehended along the track on which the wheels of the crane ran because no one was ever at work there or had occasion to go there for any purpose (fol. 184).

There was no occasion for plaintiff to expose his body on the track of the crane, because his work was all at the bottom flange, and there was room between the scaffold on which he was working and the bottom of the girder for plaintiff to pass under the girder safely (fols. 186, 187). The mystery in the case lies in the fact that plaintiff claims that he neither saw nor heard nor felt the movement of the crane until it was upon him.

During the morning in question the crane was operating as usual and had passed the place where plaintiff was working every ten or fifteen minutes (fols. 138, 140).

A clearer case of assumed risk and contributory negligence can hardly be imagined, yet the Trial Court overruled the defense of assumption of risk and submitted the questions of negligence of defendant and contributory negligence of plaintiff to the jury. The jury, in answer to the Court's questions, made specific findings that the defendant was negligent and that the plaintiff was free from contributory negligence (fols. 267-269, Ct. of Ap. R.).

The Court decided for itself that the plaintiff was at the time of the accident engaged in interstate commerce and hence within the Federal Employers' Act.

POINT I.

At the time plaintiff sustained the injuries complained of he was not employed by the defendant in interstate commerce.

At the time of the injury the plaintiff was engaged on Sunday morning working overtime, and his particular job at that time and on that occasion was the moving of a shaft-hanger for a short distance along the bottom of an overhead steel girder in defendant's railroad shops (fols. 123, 124). The defendant was having the shaft-hanger moved so that the belting leading from the shaft held in place by the shaft-hanger would have a more direct and better effect upon the machinery which the belting operated.

It was merely a re-arrangement of certain shop fixtures or appliances for the purpose of economy or greater efficiency of operation of the shop machines. No car, locomotive, bridge, right of way structure, switch or other commonly designated instrumentalities of commerce were in any way involved. As a matter of fact the plaintiff's work and the time of doing it had been arranged specifically by the foreman to be done in such manner as not to affect repair work or work of any kind upon instrumentalities of commerce. It was a millwright job (fols. 102, 107, 199, 200), and did not even involve the repair or relocation of the shaping machine or of any other machine or appliance used in the shops.

We speak within bounds and after examination when we say that there are already more than a hundred reported cases turning on the question as to whether the person claiming under the Federal

Act was within its terms—that is, was at the time of the accident engaged in interstate commerce. In mentioning this number we have tried to confine the statement to cases decided by Appellate Courts, Federal or State.

We shall, of course, not attempt to review these cases even by classes, but will content ourselves with mentioning only those decided by this Court.

The two essential elements to bring a case within the Act are (1) that the employing railroad was, at the time of the injury, engaged in interstate commerce, and (2) that the employe was, at the time of the injury, employed "in such commerce."

In New York Central R. R. Co. *v.* Carr, 238 U. S., 260, this Court, speaking through Mr. Justice Lamar, said (p. 263):

> "Each case must be decided in the light of the particular facts with a view of determining whether, at the time of the injury, the employe is engaged in interstate business, or in an act which is so directly and immediately connected with such business as substantially to form a part or a necessary incident thereof."

There are three cases reported under the style of Second Employers' Liability Cases, 223 U. S., 1.

In one of these cases the plaintiff was a locomotive fireman employed by the railroad in interstate commerce.

The second case was also one in which a locomotive fireman was employed by the railroad in interstate commerce.

The third case was one in which the plaintiff was engaged in replacing a drawbar on one of the defendant's cars then in use in interstate commerce, the car being upon the track at the time it was in course of repair.

No question seems to have been made in any of these cases as to the matter now under consideration, viz.: whether the person injured was, at the time of his injury, engaged in interstate commerce.

The case of Pedersen *v.* Delaware, L. & W. R. Co., 229 U. S., 146, was a case in which a laborer was engaged in carrying bolts to be used in repairing a bridge on the line of a railroad engaged in interstate and intrastate commerce, and this Court held the plaintiff to be within the Act.

St. Louis, S. F. & T. Ry. Co. *v.* Seale, 229 U. S., 156, was a case in which a clerk in a railroad yard, whose duty it was to examine in-coming and outgoing trains and to make a record of the numbers and initials of the cars, was killed at North Sherman, Texas, while going to meet an in-coming freight train from Madill, Oklahoma. He was held to be within the Act.

St. Louis, I. M. & S. R. Co. *v.* McWhirter, 229 U. S., 265, was a case where the employe was a flagman on an interstate commerce freight train. This case, however, turned on the proper construction of the sixteen-hour law.

Chicago, R. I. & P. R. Co. *v.* Brown, 229 U. S., 317, was a case of a switchman working in the railroad company's yard at Chicago. The case turned upon the Safety Appliance Act.

North Carolina R. Co. *v.* Zachary, 232 U. S., 248, was a case where an employe was preparing an engine for a trip to move freight in interstate commerce. It was held that, although absent temporarily from his train for a short time, for a purpose not inconsistent with his duty to his employer, he was still to be regarded as on duty and engaged in interstate commerce.

In Illinois Central R. Co. *v.* Behrens, 233 U. S.,

473, it was held that a fireman on a switch engine in a railroad yard was not engaged in interstate commerce if, at the time the accident happened, the engine was moving cars from one part of the yard to another, the cars being loaded with freight which was wholly intrastate.

In New York Central R. R. Co. *v.* Carr, 238 U. S., 260, a brakeman was injured while engaged in cutting out from a train consisting of both intrastate and interstate cars a car loaded with intrastate freight, the cutting out of the car being incident to the train's proceeding in its interstate business. It was held that the employe was at the time of the injury engaged in interstate commerce.

In Delaware, L. & W. R. Co. *v.* Yurkonis, 238 U. S., 439, the employe injured was engaged in mining coal in a colliery belonging to the railroad company, the coal being for use of the railroad "in its locomotives and engines and other equipment used in its business as a common carrier in interstate commerce." This Court dismissed the case for the want of jurisdiction, but said (p. 444):

> "The averments of the complaint as to the manner of the receiving of the injury by plaintiff showed conclusively that it did not occur in interstate commerce. The mere fact that the coal might be or was intended to be used in the conduct of interstate commerce after the same was mined and transported did not make the injury one received by the plaintiff while he was engaged in interstate commerce. The injury happening when plaintiff was preparing to mine the coal was not an injury happening in interstate commerce, and the defendant was not then carrying on interstate commerce—facts essential to recovery under the Employers' Liability Act."

It does not seem to us to be difficult to formulate a rule which is entirely consistent with a reasonable construction of the Act and with what has been decided by this Court in the application of it.

It is a truism to say that commerce consists in traffic or transportation.

The question of interstate commerce as applicable to traffic we lay to one side as not relevant to the present inquiry. The Federal Act applies alone to transportation by railroads.

It is obvious that to accomplish railroad transporation there must be rolling stock and a track over which the rolling stock moves. As this rolling stock is of various kinds, so also the track is laid not only upon the ground but over structures prepared to carry it. Nothing is essential to transportation except these two things—the rolling stock and the track. Both of these things are intimately connected with transportation.

In the Pedersen case, above cited, this Court held that it was essential to interstate commerce that a bridge which carried the track and was indeed a part of it, just as is any other part of the roadbed, should be kept in repair; otherwise interstate commerce—that is, transportation—could not continue.

In the same way, in the Seale case, this Court said that it was essential that the clerk should look over the interstate train as the termination of its interstate movement.

On the other hand, in the Yurkonis case, it was held that the coal, while being mined, could not be considered as either a vehicle of transportation or a structure over which transportation was to be conducted.

It is true that all railroads have machine shops, where the vehicles of transportation are constructed or repaired. It is also true that these machine shops have to be equipped with appliances of all kinds to be used in the construction and repair of vehicles of transportation. There must be shafts, pulleys and belts to operate these machines. There must be an engine to supply the motive power to these shafts and pulleys, and to communicate this power from the pulleys to belts, and from the belts to the machines. In all these machine shops there must be all kinds of tools and appliances. The machine shop, from the driving engine to the smallest chisel, must be kept in order and repair, and men must be employed upon these tasks. In a well ordered machine shop it must be the duty of some one, when the day's work is over, to gather up the scattered tools, to see that those which are broken are repaired, and to see that when they are beyond repair new ones are given out from the store house upon the resumption of work the next morning. If a machine in a machine shop is so far injured or worn out as to be no longer useful, it must be replaced by a new machine, and somebody must do the work of taking down and carrying off the old machine and placing in position a new one.

We submit that the Federal Act recognizes that every railroad engaged in interstate commerce has three classes of employees: (1) those employed in interstate commerce, (2) those employed in intrastate commerce, and (3) those not employed in commerce at all. Recognizing, further, the fact that the same employee may at one time be in one class, and at another time in another class, the act determines its application by the

status of the employee at the time of the accident. It is so far restricted as to apply alone to an employee who at the time of the accident is employed in interstate commerce.

We repeat, it is essential to the conduct of that kind of commerce which consists of transportation by railroads, that there should be a track and rolling stock. The one is as essential to the movement of freight as the other. If we may call these two things factors in the equation of transportation, the track is a constant factor in both kinds of transportation, viz.: interstate and intrastate.

When, therefore, we come to consider the act as applicable to the maintenance of the track, we find all employees engaged in such maintenance employed in interstate commerce because performing a service which is essential to the conduct of interstate transportation—which is interstate commerce.

On the other hand, when we find an employee connected with a vehicle of transportation, there arises a case where this vehicle, at the time the accident happens, may be used in intrastate commerce or in interstate commerce. Of course, in speaking here of vehicle we do not mean the individual car, as undoubtedly the presence of a car moving between two points in the same State, in a train moving between two States, does not take away from the train its interstate character.

But we must not forget that before we come to determine whether a given employee is, at a given time, engaged in intrastate or interstate commerce, it must be ascertained whether, at the given time, he was engaged in commerce at all. We believe that many cases have troubled the Courts and in

some instances misled them by the unwarranted assumption that the employe was, at the instant of his hurt, engaged in some kind of commerce. Assuming, without sufficient warrant, that the employee was engaged in some kind of commerce, it became necessary to choose between the two kinds. Hence, much confusion has resulted in the cases. There are many alternatives that demand "neither" as an answer.

In the instant case, therefore, we must find out whether the plaintiff, at the time of his injury, was engaged in any kind of commerce, before we begin to determine what kind of commerce it was in which he was employed. It appears that he was performing certain work necessary or convenient for the relocation of a countershaft which transmitted power to a machine in the shop belonging to the defendant. That machine had been used to make cotter pins employed in the repair of locomotive engines belonging to the defendant. It seems that the defendant does not have engines which are used now in intrastate, now in interstate, movement. It divides its engines between the two movements and distinguishes them by numbers (R., 22, fol. 64). We repeat that this machine had been used to make these pins. It is fairly to be inferred that it was expected to be employed in the future in making similar pins. When plaintiff was hurt the machine was not being used at all. If plaintiff had not been hurt and had gone back to work the next day, it may be that he would then have used this machine to make these pins for engines of the one or the other class, as occasion might arise. But, unless the engine which should break down happened to be an interstate engine the cotter pin, if made at all, would be used on an intrastate engine. If

the shop had burned down that Sunday night, there would have been no cotter pins made on it at all. Indeed, the plaintiff was not working on the machine. He was putting up a hanger on which to rest a countershaft furnished with a pulley from which a belt would run to drive a machine. This could easily be run into a concatenation that would stretch to the coal mine. While every link in this chain may combine to arrive at the result sought, viz.: an engine equipped to draw a train between two States, yet it by no means follows that the forging of each of these links can be called commerce, or that every employee engaged in every part of this chain is employed in such commerce. Maintenance and operation of the great engine which furnishes power to all the machines in the shop is just as essential to the attainment of the final result as is the repair of the machine upon which the plaintiff had worked before the accident and upon which he expected to work if there had been no accident.

We submit that it is clear that preparing to engage in commerce and engaging in commerce are two distinct things.

It is not sufficient to exempt personal property from taxation in the particular State where it is situated, that it is being prepared for transportation to another State (Coe *v.* Errol, 116 U. S., 517).

The fact that a citizen is manufacturing articles which he expects to sell in other States does not subject his factory to Federal control. An article of manufacture cannot be put into the stream of commerce until it is manufactured. In other words, articles which form the subject of interstate commerce must be manufactured before they

can become the subject of such commerce. They are not within Federal control during the process of manufacture, nor until something has been done which can fairly be said to be the beginning of their movement from one State to the other or from the United States to foreign countries. This Court has held—and it cannot be doubted that it is the law—that manufacture is one thing, and commerce in manufactured articles, quite another thing.

We submit that this is relevant to the proposition now in hand; that is, that there is a large class of railroad employees who are not engaged in any kind of commerce, and that the case at bar illustrates this class.

We come back, then, to our original proposition: That before determining in what kind of commerce a particular employee was engaged at the instant of his hurt, we must inquire whether he was then engaged in any kind of commerce.

We repeat that the sort of commerce dealt with in the act is transportation, and that it is the purpose of the act to protect employees engaged in that part of the transportation of railroads engaged in interstate commerce which consists of the interstate and not the intrastate commerce of such railroads. So far as the track is concerned, that is actually used in both kinds of commerce, and an employee repairing it is employed in such commerce. The other essential thing for transportation is the rolling stock or the vehicles which move upon this track in intrastate and interstate commerce. Of course, employees who are actually engaged in the interstate movement come within the terms of the act. We have no disposition to narrow the act by insisting that the train should

actually have begun to move before the employee could be said to be employed in interstate commerce. The making up of the train and the preparations incident to departure and to arrival at destination are fairly within the act. But even to construe the act to embrace all employees engaged in the maintenance of these vehicles which are expected in the future to be used in interstate commerce, is to give the act a construction broader than, in our judgment, should be given. To go further than this and to say that employees who are engaged not in the maintenance or operation of track or rolling stock, but in the maintenance or operation of things which are to be used in creating other things which are to be used in such maintenance and operation, is to give the statute so wide an application as to embrace a multitude of employees who, far from being employed in interstate commerce, are in fact not employed in commerce at all.

Learned counsel for the plaintiff, by his brief filed in this case, shows that he appreciates how broad a construction must be given to this act in order to bring the instant case within it. Thus, on pages 14 and 15, he speaks of the plaintiff's being engaged in interstate commerce; of the shaping machine as being an indispensable instrumentality of that commerce; of the countershaft as an inherent and essential part of the machine; and of the repairing and readjustment of the countershaft, in a legal and practical sense, as the repairing and readjustment of the machine itself. But we submit that counsel cannot stop there. From the countershaft we must go to the main shaft; from the main shaft to the driving wheel; from the driving wheel to the piston; from the

piston to the steam chest; from the steam chest to the boiler; from the boiler to the furnace; and from the furnace to the man who puts in the coal. In order to enable the plaintiff to do the work upon which he was employed at the time of the accident, the wooden horses had been set up. These, again, were a part of the work, and if a part of the work, the man who made them, and the man who carried the lumber out of which they were made, if employees of the railroad, must be held to have been engaged in interstate commerce during their several tasks.

We submit that this is to give to the act a most unreasonable construction and one which could not have been in the mind of Congress, and which, certainly, up to this time, has not been in the mind of this Court.

We therefore insist that the plaintiff was, at the time of his accident, not engaged in commerce of any kind, and that he was entirely outside of the terms of the Federal Employers' Liability Act.

POINT II.

The opinion of the Trial Judge and of the dissenting Judge in the Appellate Division, and of the dissenting Judges in the Court of Appeals, is based in each instance upon a misstatement or misapprehension of the facts.

A.

OPINION OF TRIAL JUDGE.

The Trial Court in its opinion (fols. 342-350), which was handed down upon the decision of the

defendant's motion for a new trial and the plaintiff's motion for the direction of a general verdict upon the special verdict found by the jury, stated that he, the Trial Court, understood that the defendant had stipulated on the trial that the plaintiff was in fact employed in interstate commerce at the time of his injury, and commenting upon this feature of the case the Trial Judge said:

> "But, if there was any question about it, I think that the matter is settled conclusively in plaintiff's favor by the decisions of the Supreme Court of the United States in Mondou *v.* N. Y., N. H. & H. R. Co., 223 U. S. Sup. Ct., 1, and the other cases in the series there referred to, and again in Pedersen *v.* D., L. & W. R. Co., 229 U. S. Sup. Ct., 146. In the last case Judge VanDevanter, writing for the Court says:
>
> > "'The true test always is: Is the work in question a part of the interstate commerce in which the carrier is engaged?'
>
> "The plaintiff in the case at bar was engaged in a repair shop which was devoted particularly to work on locomotives running between Hoboken, N. J. and Scranton, Pa. There were but two shops devoted to this kind of work, one in New Jersey and the other in Pennsylvania. 'Rush work,' as it was designated. His claim on the trial was that he was engaged exclusively, on that work, and defendant stated, as before suggested, that it raised no question about his evidence. The plaintiff's case is much stronger in this regard than the cases cited. This plaintiff was not working on tracks, sidings, bridges, or coal trestles, which might be used for various kinds of traffic, and in such cases it has been held that the employee comes within the protection of the act of Congress.

He was working on the locomotive engines devoted exclusively to interstate traffic—'rush work.' It seems to me that he was almost in the same category as the engineer and fireman, and I can add nothing to the opinion in the Pedersen case.

"If the defendant was engaged in interstate commerce, which is admitted, and if the plaintiff was engaged in interstate commerce, which I think is admitted on the record, but if not, it is to my mind established beyond a question under the rules laid down by the Federal Supreme Court, then the New Jersey Compensation Act does not apply because it is superseded by the Federal Act and the expressed constitutional grant to Congress of the right to regulate interstate commerce."

In other words, the Trial Court found that the plaintiff was working on locomotives and engines devoted exclusively to interstate commerce, "Rush work," and that therefore he was engaged in interstate commerce at the time when he was injured. Such statement of facts is clearly at variance with the plaintiff's broadest claim in the case, for while the plaintiff had previously been employed, and might expect subsequently to be employed, upon such work as is mentioned in the opinion of the Trial Court, at the time when he was injured he was employed, as the plaintiff himself states, at millwright work.

B.

DISSENTING OPINION IN APPELLATE DIVISION.

Justice Burr in his dissenting opinion filed upon the decision of the appeal to the Appellate Division, states the facts as follows:

"Plaintiff was a machinist, employed by the defendant at its shops at Kingsland. He testified: 'The work I was engaged in was rush. These engines would be pulled into Hoboken, and, if anything would be wrong they would send the parts to Hoboken, and I would have to get those parts—they would be pulled into the roundhouse and the parts would be sent up to Kingsland to be repaired right away and sent back.' He also testified with regard to 'rush work' that it 'would be generally on the ones (engines) going out of the State, the others they have got extra engines there to pull them out.' He further testified that he 'was the only man on this bench for this class of work.' Among the machines upon which he worked was a shaping machine. 'This machine is used for shaping keys and cotters and brasses for connecting rods.' These keys and cottters were articles used to keep the piston rod in the crosshead of the locomotives.

"The facts in immediate connection with the injury are stated in the prevailing opinion. It seems to me that, within the authorities, if plaintiff had been working upon the shaping machine and had been injured through a defect in it, he could be said to be engaged in interstate commerce. * * *

"Again, even if the plaintiff in this case had not been operating the machine, but if he had been engaged in repairing it so that it could be used, I think the same principle would apply. On the contrary, if he had been engaged in the construction of a new machine which had not yet been employed in interstate commerce, probably he would not have been. * * * In the case at bar, the machine by previous use had become an instrumentality of interstate commerce. * * * As I have tried to point out, *plaintiff was engaged in improving the condition of a machine engaged in inter-*

state commerce. The effect of such improvement would be to facilitate the transportation of such commerce. Omitting to make such improvement would hinder, delay and interfere with it. I think, therefore, that plaintiff was thus engaged."

The misapprehension of Judge Burr consists in this: That he assumes that the plaintiff at the time of receiving his injuries, was engaged "in repairing or improving the condition of a machine engaged in interstate commerce." The fact remains that while this machine had previously been used in repairing or making parts of locomotives or other instrumentalities of commerce, both interstate and intrastate, and might thereafter be so used, nevertheless at the time of the accident the machine itself was not in use, and the work upon which the plaintiff was engaged was as remote from the use of it or from the repair of any instrumentality of interstate commerce as the main engine which, through the flywheel, belting, shafts and countershafts, ultimately drove the shaping machine. It could hardly be contended that the main engine was an instrumentality of commerce, even when driving the machinery of the shop, and certainly it was not an instrumentality of commerce so far as repairs to it are concerned. This is essentially the case if at the time of making repairs to the engine the shop was shut down and that no other work was going on in the shop.

C.

DISSENTING OPINION IN COURT OF APPEALS.

In the Court of Appeals Judge Seabury wrote the dissenting opinion, in which Judge Cardozo concurred. Judge Seabury said:

> "On the day of the accident *the plaintiff was engaged under the direction of the superintendent, in repairing the shaping machine by moving it two feet to make room for the shaft.* In removing it, it was necessary to take down the countershaft, to bore new holes in the girder and to refasten the hangers and countershaft *so that the shaping machine could be used without interruption from the operation of the crane.* * * *
>
> "If the plaintiff had been engaged at the time of the accident in working upon a locomotive engaged in interstate commerce, it is conceded that he would be within the Federal Statute. Is he without the protection of this statute *because he was working to put in order a machine that was to be used in repairing locomotives engaged in interstate commerce? In my opinion he was not. The work of repairing the shaping machine was not independent of interstate commerce. It was essential to the carrying on of that commerce.* The work of putting that machine in order so that it could be used in the repair of locomotives engaged in interstate commerce, was just as much an act of interstate commerce as if the work had been done upon such locomotive. * * *
>
> "This is a case where the plaintiff was injured *while engaged in the performance of an act necessary to maintaining in proper condition the shaping machine which was as much an instrumentality of interstate commerce as are bolts used in the repair of a bridge.* With-

> out this machine the locomotives engaged in interstate commerce could not have been repaired and put in condition to be used in such commerce. It may have been minor work, but it was none the less an essential part of the larger work of putting in repair locomotives engaged in interstate commerce."

Justice Seabury focuses his attention upon the fact that the plaintiff was engaged in repairing the shaping machine which had been used in repairing locomotives engaged in interstate commerce, and avers that the work of repairing the shaping machine was not independent of interstate commerce, but was essential in carrying out that commerce; and that the work of putting the machine in order so it could be used in repairing locomotives used in interstate commerce was as much interstate commerce as if the work had been done upon such locomotive.

These facts do not bring the case within the language of the statute, which is to the effect that the *plaintiff must be employed at the time of receiving his injury in interstate commerce.* The fact that the machine had previously been so used and might be so used again is irrelevant under the authority of the Behren's case. The material fact in this case is that the machine which may or may not have been an instrumentality of interstate commerce, according to the work upon which it was immediately engaged, was not in fact being used in any work, it was not in operation at all at the time the plaintiff was injured. Moreover, plaintiff was not injured while repairing the machine or moving the machine, or doing any work whatsoever upon the machine, nor is there any basis in the evidence for the assumption that "it was necessary

to take down the countershaft * * * so that the shaping machine could be used without interruption from the operation of the crane." He was injured while rearranging a fixture of the shop which could be used indifferently for the purpose of driving this shaping machine or any other machine, and which could without interference with interstate commerce or any other commerce, have been left as it was. The relocation of the countershaft and hangers was a matter of shop construction and had no more to do with interstate commerce than the location and arrangement of the said countershaft and hangings when they were first installed.

The prevailing opinion of the Court of Appeals by Judge Chase, in which Judges Bartlett, Hiscock, Cuddeback and Miller concurred, correctly states the facts and applies the law of the case.

POINT III.

This is a case to which the Workmen's Compensation Act of New Jersey applied, and to which the Federal Employers' Liability Act did not apply.

We respectfully submit that the judgment of the Supreme Court of the State of New York, as entered upon the remittitur, be affirmed.

Respectfully submitted,

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SHANKS *v.* DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY.

ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

No. 477. Argued November 30, 1915.—Decided January 10, 1916.

To recover under the Employers' Liability Act, not only must the carrier be engaged in interstate commerce at the time of the injury, but also the person injured must be employed by the carrier in such commerce.

Where a railroad company, which is engaged in both interstate and intrastate transportation, conducts a machine shop for repairing locomotives used in such transportation, an employé is not engaged in interstate commerce while taking down and putting up fixtures in such machine shop, and cannot, if injured while so doing, maintain an action under the Employers' Liability Act, even though on other occasions his employment relates to interstate commerce.

214 N. Y. 413, affirmed.

THE facts, which involve the validity of a verdict and judgment in an action for injuries under the Employers' Liability Act, are stated in the opinion.

Mr. Joseph A. Shay, with whom *Mr. Nash Rockwood* and *Mr. I. B. McKelvey* were on the brief, for plaintiff in error.

Mr. Alexander Pope Humphrey, with whom *Mr. W. S. Jenney* was on the brief, for defendant in error.

MR. JUSTICE VAN DEVANTER delivered the opinion of the court.

Shanks sued the Railroad Company for damages resulting from personal injuries suffered through its negligence while he was in its empioy, and rested his right to

recover upon the Employers' Liability Act of Congress. His injuries were received in New Jersey and his action was brought in the Supreme Court of New York. He prevailed at the trial, but in the Appellate Division the judgment was reversed with a direction that his complaint be dismissed without prejudice to any remedy he might have under the law of New Jersey, and this was affirmed by the Court of Appeals, the ground of the appellate rulings being that at the time of the injury he was not employed in interstate commerce. 163 App. Div. 565; 214 N. Y. 413. To obtain a review of the judgment of the Court of Appeals he sued out this writ of error, which was directed to the Supreme Court because the record was then in its possession. See *Atherton* v. *Fowler*, 91 U. S. 143; *Wurts* v. *Hoagland*, 105 U. S. 701; *Sioux Remedy Co.* v. *Cope*, 235 U. S. 197.

In so far as its words are material here, the Employers' Liability Act declares that "every common carrier by railroad while engaging in commerce between any of the several States . . . shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce," if the injury results in whole or in part from the negligence of the carrier or of any of its officers, agents or employés. Thus it is essential to a right of recovery under the act not only that the carrier be engaged in interstate commerce at the time of the injury but also that the person suffering the injury be then employed by the carrier in such commerce. And so it results where the carrier is also engaged in intrastate commerce or in what is not commerce at all, that one who while employed therein by the carrier suffers injury through its negligence, or that of some of its officers, agents or employés, must look for redress to the laws of the State wherein the injury occurs, save where it results from the violation of some Federal statute, such as the Safety Appliance Acts.

The facts in the present case are these: The Railroad Company was engaged in both interstate and intrastate transportation and was conducting an extensive machine shop for repairing parts of locomotives used in such transportation. While employed in this shop Shanks was injured through the negligence of the company. Usually his work consisted in repairing certain parts of locomotives, but on the day of the injury he was engaged solely in taking down and putting into a new location an overhead counter-shaft—a heavy shop fixture—through which power was communicated to some of the machinery used in the repair work.

The question for decision is, was Shanks at the time of the injury employed in interstate commerce within the meaning of the Employers' Liability Act? What his employment was on other occasions is immaterial, for, as before indicated, the act refers to the service being rendered when the injury was suffered.

Having in mind the nature and usual course of the business to which the act relates and the evident purpose of Congress in adopting the act, we think it speaks of interstate commerce, not in a technical legal sense, but in a practical one better suited to the occasion (see *Swift & Co.* v. *United States*, 196 U. S. 375, 398), and that the true test of employment in such commerce in the sense intended is, was the employé at the time of the injury engaged in interstate transportation or in work so closely related to it as to be practically a part of it.

Applying this test, we have held that the requisite employment in interstate commerce exists where a car repairer is replacing a drawbar in a car then in use in such commerce, *Walsh* v. *New York, New Haven & Hartford R. R.*, 223 U. S. 1; where a fireman is walking ahead of and piloting through several switches a locomotive which is to be attached to an interstate train and to assist in moving the same up a grade, *Norfolk & Western Ry.* v. *Earnest*,

229 U. S. 114; where a workman about to repair a bridge regularly used in interstate transportation is carrying from a tool car to the bridge a sack of bolts needed in his work, *Pederson* v. *Del., Lack. & West. R. R.*, 229 U. S. 146; where a clerk is on his way through a railroad yard to meet an inbound interstate freight train and to mark the cars so the switching crew will know what to do with them when breaking up the train, *St. Louis, San Francisco & Texas Ry.* v. *Seale*, 229 U. S. 156; where a fireman, having prepared his engine for a trip in interstate commerce, and being about to start on his run, is walking across adjacent tracks on an errand consistent with his duties, *North Carolina R. R.* v. *Zachary*, 232 U. S. 248; and where a brakeman on a train carrying several cars of interstate and two of intrastate freight is assisting in securely placing the latter on a side track at an intermediate station to the end that they may not run back on the main track and that the train may proceed on its journey with the interstate freight, *New York Central R. R.* v. *Carr*, 238 U. S. 260.

Without departing from this test, we also have held that the requisite employment in interstate commerce does not exist where a member of a switching crew, whose general work extends to both interstate and intrastate traffic, is engaged in hauling a train or drag of cars, all loaded with intrastate freight, from one part of a city to another, *Ill. Cent. R. R.* v. *Behrens*, 233 U. S. 473, and where an employé in a colliery operated by a railroad company is mining coal intended to be used in the company's locomotives moving in interstate commerce, *Del., Lack. & West. R. R.* v. *Yurkonis*, 238 U. S. 439. In neither instance could the service indicated be said to be interstate transportation or so closely related to it as to be practically a part of it.

Coming to apply the test to the case in hand, it is plain that Shanks was not employed in interstate transporta-

tion, or in repairing or keeping in usable condition a roadbed, bridge, engine, car or other instrument then in use in such transportation. What he was doing was altering the location of a fixture in a machine shop. The connection between the fixture and interstate transportation was remote at best, for the only function of the fixture was to communicate power to machinery used in repairing parts of engines some of which were used in such transportation. This, we think, demonstrates that the work in which Shanks was engaged, like that of the coal miner in the *Yurkonis Case*, was too remote from interstate transportation to be practically a part of it, and therefore that he was not employed in interstate commerce within the meaning of the Employers' Liability Act.

Judgment affirmed.